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Criminal Law - Wyoming Limits the Availability of Abandonment as a Defense to Criminal Attempt - Ramirez v. State

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CRIMINAL LAW—Wyoming Limits the Availability of Abandonment as a Defense to Criminal Attempt. *Ramirez v. State*, 739 P.2d 1214 (Wyo. 1987).

Jimmy Ramirez and Pam Blesi began dating during the summer of 1974.¹ Although they had several fights, their relationship continued for almost a year.² In one particularly heated argument, Ramirez stabbed Blesi nine times with an ice pick.³ Soon after the stabbing, at Blesi's request, Ramirez called an ambulance. He stayed with Blesi until it arrived.⁴

Ramirez was charged with attempted second degree murder. At trial, the defense counsel offered jury instructions on the defense of abandonment.⁵ The court refused the instructions and instead instructed the jury on the crime of attempt.⁶ The trial court convicted Ramirez of attempted second degree murder and sentenced him to twenty to thirty years in the state penitentiary.⁷

On appeal, Ramirez argued that the court erred by failing to instruct the jury on the abandonment defense.⁸ He maintained that since he stopped stabbing Blesi before she died, then called an ambulance, he had abandoned his effort.⁹ The State argued that abandonment may not be raised as a defense after the actor takes a substantial step towards the commission of the crime.¹⁰ The Supreme Court affirmed the conviction, finding that the crime of attempted second degree murder was complete after Ramirez stabbed Blesi the first time,¹¹ and abandonment was no longer an available defense once the attempt was complete.¹²

1. *Ramirez v. State*, 739 P.2d 1214, 1215 (Wyo. 1987).

2. *Id.*

3. *Id.*

4. Brief of Appellant at 6, *Ramirez v. State*, 739 P.2d 1214 (Wyo. 1987) (No. 86-212) [hereinafter Appellant's Brief].

5. *Ramirez*, 739 P.2d at 1215. Appellant offered the following instruction:

When Abandonment of An Attempt is a Defense.

Abandonment is a defense if the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution and where there is no outside cause prompting such abandonment.

Appellant's Brief, *supra* note 4, at 8.

6. *Ramirez*, 739 P.2d at 1215. The court gave the following instruction:

An attempt to commit a crime consists of two elements; namely, an intent to commit the crime and a direct but ineffectual act done toward its commission.

In determining whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one ha[n]d, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation is not sufficient to constitute an attempt. To constitute an attempt, the act must clearly indicate an unambiguous intent to commit the specific crime, and the act must be an immediate step in the present execution of the crime.

Appellant's Brief, *supra* note 4, at 8-9.

7. *Ramirez*, 739 P.2d at 1216.

8. *Id.* Abandonment, renunciation and withdrawal are all used to describe this defense. In the interests of simplicity and consistency, this casenote will term the defense "abandonment."

9. *Id.*

10. Brief of Appellee at 9, *Ramirez v. State*, 739 P.2d 1214 (Wyo. 1987) (No. 86-212).

11. *Ramirez*, 739 P.2d at 1217.

12. *Id.*

Although the plain language of the abandonment statute suggests that the Wyoming legislature intended to offer abandonment as an affirmative defense to an attempt charge, a careful analysis of *Ramirez* demonstrates that in Wyoming the defense is an unavailable fiction. This casenote will examine whether the Wyoming Supreme Court correctly limited the abandonment defense.

BACKGROUND

Traditional View

At Common Law and under most modern statutes it is a crime to attempt any felony or misdemeanor.¹³ An attempt consists of a specific criminal intention manifested by an overt act.¹⁴ Defenses to an attempt charge include legal impossibility, factual impossibility or abandonment of criminal effort.¹⁵

Although involuntary abandonment is never a defense to an attempt charge, voluntary abandonment is frequently allowed.¹⁶ Involuntary abandonment is defined as desistance because of unanticipated problems in carrying out the attempt, or fear of apprehension by authority.¹⁷ Voluntary abandonment, on the other hand, is desistance from an attempt due to a "change of heart" or pangs of conscience.¹⁸ Traditionally, even voluntary abandonment was not a defense to a charge of attempt if the defendant, with the requisite criminal intent, had committed an act beyond the preparation phase of the crime.¹⁹

The classic example of the traditional approach is *People v. Staples*.²⁰ In *Staples*, the defendant concocted a scheme to rob a local bank. He rented an office over a bank vault, and began drilling into the floor above the vault when no one was in the building. He stopped drilling before the holes went through the floor and covered the damaged area with a rug.²¹ Allegedly he had changed his mind about completing the plan.²² The police arrested Staples two months later, charging him with attempted burglary.²³ At trial, he claimed to have abandoned his criminal effort, arguing that his actions were merely preparatory.²⁴ The court rejected this claim, stating that his actions were more than preparatory since he damaged the property by drilling.²⁵ The court employed the traditional view of abandonment and held that since Staple's actions were more than preparatory, abandonment was not available.²⁶

13. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6.3, at 495 (2d ed. 1986).

14. *Id.* at 520.

15. MODEL PENAL CODE § 5.01, comment 3 at 307-14 (1985).

16. *Id.* comment 8, at 356.

17. *Id.*

18. *Id.*

19. W. LAFAVE & A. SCOTT, *supra* note 13, § 6.3, at 521.

20. 6 Cal. App. 3d 61, 85 Cal. Rptr. 589 (1970).

21. *Id.*, 85 Cal. Rptr. at 590.

22. *Id.*

23. *Id.*

24. *Id.* at 591.

25. *Id.* at 594.

26. *Id.*

The traditional approach involved the difficult task of determining whether the person's actions should be classified as mere preparation or as an overt act.²⁷ The basis of this approach is that a crime (attempt) completed cannot be abandoned.²⁸ Traditionally, then, a defendant could avoid liability for the attempt only if he renounced his criminal intent before he committed an overt act in furtherance of the crime. The obvious policy reason for making an overt act punishable is to allow police intervention before the actual crime is committed, but after a person's intentions are manifested by his actions.²⁹ Some commentators have also suggested that a person might actually be encouraged to attempt crimes if he knows that he can stop at any stage without fear of punishment.³⁰

Modern Approach

The Model Penal Code, proposed by the American Law Institute (ALI) in 1962, had an immediate and widespread effect on state criminal codes.³¹ When the Model Penal Code emerged, the courts were split on the issue of whether abandonment could be a defense after a defendant had taken a substantial step.³² The Code philosophy differs greatly from the traditional view,³³ providing that a complete and voluntary abandonment is almost always a defense to attempt.³⁴

The Code commentary stresses numerous other policy reasons for allowing the abandonment defense.³⁵ The benefit to society of encouraging desistance from crimes is so great that the defense should be available even after the last proximate act has been committed.³⁶ In the early

27. *Id.* at 593.

28. Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L. REV. 319, 354 (1955).

A criminal attempt is a complete offense in the sense that one who has carried a criminal effort to such a point that it is punishable, can no more wipe out his criminal guilt by an abandonment of his plan than a thief can obliterate a larceny by a restoration of the stolen chattels.

Id.

29. *Staples*, 85 Cal. Rptr. at 593.

30. W. LAFAVE & A. SCOTT, *supra* note 13, § 6.3, at 522.

31. See Lauer, *Good-bye 3-Card Monte: The Wyoming Code of 1982 (Pt. 1)*, 19 LAND & WATER L. REV. 107, 120 (1984). Prior to 1952, when the Model Penal Code drafting began, only one state had revised its criminal code in the 20th century. Since 1952, all 50 states have attempted revisions.

See also Weshler, *Revision and Codification of Penal Law*, 7 DALHOUSIE L.J. 219, 233-34 (1984), for a complete analysis of post-Model Penal Code revision in the United States through 1983.

32. MODEL PENAL CODE § 5.01 comment 8, at 356.

33. *Id.* at 356-60.

34. *Id.* MODEL PENAL CODE § 5.01(4) provides:

"When the actor's conduct would otherwise constitute an attempt . . . it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

35. MODEL PENAL CODE § 5.01 comment 8, at 360.

36. *Id.* In cases where a person's actions have gone beyond preparation, indicating prima facie firmness of purpose, he should be allowed to rebut the conclusion by demonstrating that he completely renounced his criminal purpose.

An excellent example of the effectiveness of modern abandonment analysis is *Commonwealth v. McCloskey*. The defendant attempted to escape from prison by climbing a fence

stages of an attempt a complete abandonment negatives the criminal intent.³⁷ The further the attempt progresses the more controversial the defense becomes.³⁸ The commentary noted that the last stages of an attempt are by far the most dangerous, and any possible incentive for a person to abort the crime should be allowed.³⁹ When a person has harmed property or injured another person, desistance should be encouraged even more.⁴⁰ The Model Penal Code commentary suggests that abandonment should be an available defense in all but the most extreme cases of attempt.⁴¹ Specifically, if an actor has put forces into motion which he can no longer control, abandonment should not be available as a defense.⁴²

Wyoming Law

The Wyoming Legislature began revising Wyoming's Criminal Code in 1979.⁴³ Prior to this time, Wyoming did not have a general attempt statute or an abandonment provision. The Model Penal Code greatly influenced Wyoming's revised Criminal Code.⁴⁴ Though the new state criminal code was not in effect until 1983, the legislature enacted the criminal attempt and abandonment statutes in 1981. The abandonment defense provides that "[a] person is not liable under this section [Attempt] if, under circumstances manifesting a voluntary and complete renunciation of his criminal intention, he avoided the commission of the crime attempted by abandoning his criminal effort."⁴⁵

The legislature amended the abandonment provision in 1983 by adding the following Model Penal Code limitations to section 6-1-301 (b):

Within the meaning of this subsection, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part,

around the prison yard. He went so far as to clip the barbed wire at the top edge of the fence before changing his mind. He claimed his concern for his family and contemplation of the possible consequences caused him to abandon his effort. The appellate court reversed the defendant's conviction of attempted prison breach. A concurring justice stated that the defendant's abandonment of his plan was a sufficient defense to the crime. *Commonwealth v. McCloskey*, 234 Pa. Super 577, 341 A.2d 500 (1975).

37. MODEL PENAL CODE § 5.01 comment 8, at 360.

See also G. WILLIAMS, CRIMINAL LAW; THE GENERAL PART 620-21 (2d ed. 1961). "[W]here the accused has changed his mind, it would be only just to interpret his previous intention where possible as only half-formed or provisional . . ."

Another point to consider is that punishment based on reformation or deterrence is superfluous if the offender withdrew because he realized what he was doing was wrong.

38. MODEL PENAL CODE § 5.01 comment 8, at 360.

39. *Id.* at 359. See also H. GROSS, A THEORY OF CRIMINAL JUSTICE 166 (1979). The primary purpose of criminal law is to prevent the occurrence of harm. It makes sense to provide a reasonable inducement for the attempter to desist before any real harm is done.

40. MODEL PENAL CODE § 5.01 comment 8, at 359. "At the very point where abandonment least influences a judgment as to the dangerousness of the actor - where the last proximate act has been committed but the resulting crime can still be avoided - the inducement to desist stemming from the abandonment defense achieves its greatest value."

41. *Id.* at 360.

42. *Id.*

43. Lauer, *supra* note 31, at 110.

44. *Id.* "The Model Penal Code's influence is hardly surprising; it has been the single greatest influence in American substantive criminal legislation in the past half century." Compare MODEL PENAL CODE § 5.01 (4) to WYO. STAT. § 6-1-301 (b) (1977, Rev. 1988).

45. WYO. STAT. § 6-1-301(b) (1977, Rev. 1988).

by circumstances, not present or apparent at the inception of the person's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal intention. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.⁴⁶

The plain language of section 6-1-301(b) provides a complete defense to attempt if the actor voluntarily and completely renounces his criminal intent. The abandonment defense is especially important in Wyoming where, contrary to most other states,⁴⁷ the crime of attempt is almost always punished the same as the crime attempted.⁴⁸

In 1982, the court analyzed the newly adopted abandonment provision in *Haight v. State*.⁴⁹ Haight and two other men abducted a girl. The two other men sexually assaulted the girl while Haight watched guard.⁵⁰ Although Haight attempted to sexually assault the girl, he did not complete the assault.⁵¹ Haight was convicted of attempted sexual assault. He argued on appeal that he had voluntarily and completely abandoned his attempt to commit a sexual crime. The court found that the defendant desisted from his attempt partially because his victim resisted more than he anticipated. The court ruled that Haight's desistance, motivated by his victim's resistance, was not voluntary within the meaning of Wyoming's abandonment provision.⁵² The court noted that Wyoming's abandonment statute was similar to the Model Penal Code's provision, and that it deviated greatly from the traditional approach.⁵³ The *Haight* prosecution argued that Haight could not legally abandon the crime since the attempt was complete before the alleged abandonment. The *Haight* court rejected this argument and stated, "That was indeed the traditional view. . . . That, however, is not how [Wyoming's abandonment provision] is worded."⁵⁴ The *Haight* court interpreted the statute to provide a defense to abandonment if a person voluntarily and completely renounces his criminal intent and avoids the commission "of the crime attempted" by abandoning his criminal effort.⁵⁵ The court acknowledged that voluntary

46. *Id.*

47. 4 WHARTON'S CRIMINAL LAW, 566, 595 (1981).

48. WYO. STAT. § 6-1-304 (1977, Rev. 1988), provides that attempts are punished as the principal crime, with the exception of capital crimes.

49. 654 P.2d 1232, 1241 (Wyo. 1982). The *Haight* court stated that renunciation statutes are analytically unsound but speculated that legislatures adopt them because presumably they encourage people to forego criminal activity. The court adopted Colorado's definitions for when abandonment is not voluntary. The Wyoming legislature followed up on this by amending the statute in 1983.

50. *Id.* at 1236.

51. *Id.* at 1238.

52. *Id.* at 1242.

53. *Id.* at 1241.

54. *Id.*

55. *Id.*

abandonment is a defense to an attempt after a substantial step has occurred,⁵⁶ but ruled that abandonment in *Haight's* case was involuntary.⁵⁷

The Wyoming legislature, with section 6-1-301(b), adopted a defense to attempt which allows a person to escape liability if he voluntarily renounces his criminal intent and abandons his criminal effort.⁵⁸ In *Haight*, the Wyoming Supreme Court interpreted the statute to allow voluntary abandonment as a defense even after a substantial step is taken in furtherance of the crime, when the attempt would otherwise have been punishable.⁵⁹

THE PRINCIPAL CASE

Jimmy Ramirez was charged with attempted second degree murder. At trial, the defense counsel offered jury instructions on the defense of abandonment. The trial court rejected the offer and instead instructed the jury on attempt. Ramirez raised the dismissal of the abandonment instruction on appeal. He claimed he avoided murdering his victim by voluntarily abandoning his effort and calling an ambulance.⁶⁰

The Wyoming Supreme Court began its analysis of the issue by looking to the *Haight* decision.⁶¹ The court reaffirmed the *Haight* ruling, stating that abandonment may be an available defense even after the defendant has taken a substantial step toward the commission of a crime.⁶² However, it immediately qualified this statement with the following conclusion: "There comes a point, however, when abandonment is no longer possible. In a murder attempt, this point is clearly reached once the actor has injured his victim."⁶³ After the *Ramirez* court stated its conclusion, it began a labored rationalization. The court relied on hornbooks for support,⁶⁴ and then quoted a provision from the Model Penal Code commentary:

[B]ecause of the importance of encouraging desistance in the final stages of the attempt, the defense is allowed even when the last proximate act has occurred but the criminal result can be avoided, as for example when the fuse has been lit but can still be stamped out. If, however, the actor has put in motion forces that he is powerless to stop, then the attempt has been completed and cannot be abandoned.⁶⁵

The court concluded that the Wyoming abandonment provision allows the defense only where the defendant avoids committing the crime

56. *Id.*

57. *Id.* at 1242.

58. WYO. STAT. § 6-1-301(b) (1977, Rev. 1988).

59. *Haight*, 654 P.2d at 1242.

60. *Ramirez*, 739 P.2d at 1216.

61. *Id.*

62. *Id.*

63. *Id.* The court proves later that this point is not so clearly reached. *Id.* at 1216-17.

64. *Id.* (quoting W. LAFAVE & A. SCOTT, *supra* note 13, § 60 at 451, PERKINS AND BOYCE, CRIMINAL LAW 656 (3d. ed. 1982)).

65. *Ramirez*, 739 P.2d at 1217 (quoting MODEL PENAL CODE § 5.01 comment 8, at 360).

(attempt, not murder) by abandoning his criminal effort.⁶⁶ The court found that Ramirez's criminal effort was complete, and could not be abandoned, when he stabbed Blesi once.⁶⁷ The court then ruled that the trial court properly denied the jury instruction on abandonment.⁶⁸

ANALYSIS

The Wyoming Supreme Court considered the abandonment statute for the second time with *Ramirez*.⁶⁹ Despite the bizarre facts of *Ramirez*, and the less than concrete attempt and abandonment statutes, the court arrived at a seemingly just conviction. However, in the process, it contradicted precedent and disregarded statutory language. The court's decision in *Ramirez* results in confusing precedent.

Although the court properly looked to *Haight* for guidance,⁷⁰ it improperly applied the *Haight* ruling. *Haight* held that voluntary abandonment is an available defense even after a substantial step is taken in furtherance of the crime, if the defendant avoids committing the crime attempted.⁷¹ Rather than evaluating Ramirez's abandonment, the court simply concluded that in a murder attempt, abandonment is never an available defense when a person has injured his victim.⁷² Sometimes this is undoubtedly true, as in Ramirez's case. But as precedent, the statement is overbroad and dangerously unjust. The statement is unqualified as to the degree of injury required or the relationship of the injury to the attempted crime. If a person who is carrying a gun and contemplating murder changes his mind about the murder and decides instead to punch his victim in the mouth, abandonment of criminal intent should still be an available defense. Obviously this type of desistance should be encouraged.⁷³ In Wyoming, this person could be guilty of attempted murder despite the individual's decreased culpability.

The court stated that abandonment was not available because Ramirez had completed his attempt.⁷⁴ In Wyoming, an attempt is complete

66. *Id.* at 1217.

67. *Id.*

68. *Id.*

69. *Haight*, 739 P.2d at 1232, is the only other case where the court has actually applied the abandonment provision. The crime of attempt is abstract enough, without being coupled with the even more troublesome abandonment provision. "Eminent judges have been puzzled where to draw the line, or even to state the principle on which it should be drawn. . . ." O.W. HOLMES, JR., *THE COMMON LAW* 68 (1881).

70. *Ramirez*, 739 P.2d at 1216.

71. *Haight*, 654 P.2d at 1241. The crime of criminal attempt has been described as "a complete obstacle to intelligible judicial speech and an encumbrance on intelligent judicial action." Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 *YALE L.J.* 53, 79 (1940).

72. *Ramirez*, 739 P.2d at 1216.

73. See *supra* note 40.

74. *Ramirez*, 739 P.2d at 1217.

when a person takes a substantial step in furtherance of the crime.⁷⁵ The holding contradicts the court's interpretation of the abandonment provision in *Haight*, and resurrects the traditional view of abandonment. The traditional analysis allows abandonment as a defense only if a person has not yet committed an overt act towards the commission of the crime.⁷⁶ In reality the traditional view simply denies the existence of an abandonment defense to attempt. If a person has not yet committed an overt act, no attempt has been made, no crime has been committed, and there is simply nothing to forgive or defend.

The court disregarded the abandonment provision of the Wyoming statute which states that if a person's renunciation is complete and voluntary, and he avoids committing the crime attempted by abandoning his criminal effort, he will not be liable.⁷⁷ Arguably, Ramirez had voluntarily abandoned the murder attempt when he stopped stabbing his victim before she died. He went even further and called an ambulance for her. The Wyoming abandonment statute does not exclude attempted murder from its realm so the court should have evaluated Ramirez's alleged abandonment under the provision. The statute states that a person is not liable for attempt if he "avoid[s] commit[ing] the crime attempted by abandoning his criminal effort."⁷⁸ Ramirez clearly could have completed the murder of Blesi, but after he stabbed her several times the possibility of avoiding the result was out of his hands. The Model Penal Code commentary limits the abandonment defense when an "actor has put in motion forces that he is powerless to stop."⁷⁹ Ramirez's actions exemplify this limitation. By stabbing Blesi, Ramirez put forces in motion of which he had no control. Ramirez was fortunate that the ice pick did not pierce an artery or vital organ. When a person has the requisite culpability but lacks the skill to carry out his attempted crime it is clearly only fortuitous that the crime was not complete. Any change of heart at this point is simply too late. Ramirez could no longer abandon his attempt because of the serious, uncontrollable risk he took with her life by stabbing her.

The Wyoming legislature adopted the abandonment provision in 1981, and amended it in 1983.⁸⁰ In doing so it rejected the traditional approach.⁸¹ The statute clearly adopts the modern approach, providing a defense to the crime of attempt. The actor may still be innocent of an attempt charge

75. WYO. STAT. § 6-1-301(a) (1977, Rev. 1988), provides that:

(a) A person is guilty of an attempt if:

(i) With the intent to commit the crime, he does any act which is a substantial step towards commission. A "substantial step" is conduct which is strongly corroborative of the firmness of the person's intention to complete the commission of the crime. . . .

76. See *Staples*, 85 Cal. Rptr. at 594.

77. WYO. STAT. § 6-1-301 (b) (1977, Rev. 1988).

78. *Id.*

79. MODEL PENAL CODE § 5.01 comment 8, at 360.

80. WYO. STAT. § 6-1-301 (b) (1977, Rev. 1988).

81. The Wyoming Criminal Code provides that common law defenses are retained *unless otherwise provided by the code*. WYO. STAT. § 6-1-102 (b) (1977, Rev. 1988) (emphasis added).

if he avoids committing the crime attempted by completely and voluntarily renouncing his criminal intention, even after taking a substantial step towards the crime.

The strict traditional view which the Wyoming Supreme Court articulated in its conclusion is in direct conflict with the language of Wyoming Statute section 6-1-301(b). The conclusion thwarts the legislative intent of allowing the defense. When the legislature adopted the abandonment defense, it provided a defense to attempt that had, until then, been unavailable in Wyoming.

Although the court gave lip service to the *Haight* ruling,⁸² it did not follow through with the required statutory analysis. Undoubtedly the *Ramirez* court could have reached the same conclusion if it had applied the Model Penal Code's suggested limitations. The court should have classified Ramirez's actions as putting into motion forces which he was powerless to stop, thus avoiding the commission of murder by chance rather than by any affirmative action. The court could have then affirmed the conviction on grounds more in accord with the legislative intent.

In addition, the court made two statements which may be unjustifiably relied on as precedent. In the first it stated that "[i]n the case of attempted murder abandonment is no longer a defense once the actor has injured the victim."⁸³ The second was that abandonment is no longer an available defense once the attempt is complete.⁸⁴ In Wyoming an attempt is complete when the first substantial act is performed.⁸⁵ Before a substantial act has taken place there is no need for a defense, and after a substantial act, abandonment is not available. Therefore, the court's statement effectively eliminates the possibility of an abandonment defense.

CONCLUSION

Abandonment is not an available defense once the attempt is complete, after *Ramirez*. In Wyoming an attempt is complete when an individual takes a substantial step towards his intended crime. The court's conclusion is, therefore, a restatement of the traditional approach to abandonment which the Wyoming legislature rejected.

Abandonment should be allowed as a defense to attempt in the early stages because it effectively negates the criminal intent requirement. Likewise, desistance should be encouraged in the later stages to reduce the severity of the crime. The legislature drew the line of not allowing the defense when the desistance is involuntary. In addition, if the actor has put forces in motion that he is powerless to stop, the defense of abandon-

82. *Ramirez*, 739 P.2d at 1216.

83. *Id.*

84. *Id.* at 1217.

85. WYO. STAT. § 6-1-301(a) (1977, Rev. 1988).

ment should not be available. This limitation should be added to those enumerated in Wyoming's abandonment provision.

The plain language of the Wyoming abandonment statute permits abandonment as a defense even after a substantial step is taken, if the abandonment is complete and voluntary. By reviving the traditional approach to abandonment, and disregarding statutory language, the court created a confusing standard where abandonment is raised as a defense.

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