

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: SB 234

INTRODUCER: Senators Fasano and Evers

SUBJECT: Offenses Against Unborn Children

DATE: February 3, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Pre-meeting
2.	_____	_____	TR	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates a new definition of “unborn child” within three provisions of the criminal code. Specifically, the current term (“viable fetus”) and definition (“a fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures.”) is amended to become: “the term ‘unborn child’ means the unborn offspring of a human being at any stage of gestation from fertilization until birth.”

The new definition applies to the criminal offenses of vehicular homicide, DUI manslaughter, and all murder offenses from capital murder through manslaughter where the unborn child dies as a result of injury to, or the death of, the mother.

The bill also makes conforming changes to s. 435.04, F.S., relating to employment screening standards, and s. 921.0022, F.S, the offense severity ranking chart.

This bill substantially amends the following sections of the Florida Statutes: 316.193, 435.04, 782.071, 782.09, and 921.0022.

II. Present Situation:

History of Prenatal Criminal Law

Beginning in the 17th century, the common law rule was that only children who were born alive were afforded protections of the criminal law.¹ This became known as the “born alive rule.” Due

¹ Joseph L. Falvey, Jr., *Kill an Unborn Child – Go to Jail: The Unborn Victims of Violence Act of 2004 and Military Justice*, 53 NAVAL L. REV. 1, 1 (2006).

to the lack of medical technology in that time, it was difficult for doctors to know the health or condition of an unborn child; therefore, it was impossible to prove whether an assault on the mother was the proximate cause of the death of the fetus. The born alive rule became the standard in federal cases for imposing additional punishment on a perpetrator in crimes against an expectant mother. The born alive rule has been challenged many times; however, courts have upheld it stating that it is the job of the state legislatures to change the law.

Alternatively, some jurisdictions began adopting the rule that an unborn child is afforded protection of the criminal law at quickening, which was defined as “the first recognizable movements of the fetus, appearing usually from the sixteenth to eighteenth week of pregnancy.”² Quickening also became the evidentiary standard for determining whether a person violated an abortion statute because, at the time (early 20th century), it was the most certain way to determine whether a woman was pregnant or not.

Finally, many jurisdictions have determined that an unborn child is afforded protection under the law if the fetus is viable. This term has been defined as “the physical maturation or physiological capability of the fetus to live outside the womb.”³ The Massachusetts Supreme Court became the first court to include viable unborn children in the statutory meaning of “person” for purposes of criminal laws.⁴

Due to the advancement in technology and challenges to the born alive rule, many state legislatures have enacted changes to their criminal laws to provide a criminal penalty for crimes against unborn children. Although many jurisdictions began enacting such laws, some people felt that no protection existed for an unborn victim of a federal crime.⁵

Federal Unborn Victims of Violence Act⁶

The Unborn Victims of Violence Act (UVVA or act), signed into law on April 1, 2004, establishes a separate offense for harming or killing an unborn child during the commission of specified crimes.⁷ Under the act, any person who injures or kills a “child in utero” during the commission of certain specified crimes is guilty of an offense separate from one involving the pregnant woman. Punishment for the separate offense is the same as if the offense had been committed against the pregnant woman. In addition, an offense does not require proof that the person engaging in the misconduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of, or bodily injury to, the child in utero. The term “child in utero” is defined by the act to mean “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”

In an attempt to preserve a woman’s right to have an abortion, there are three specific exclusions from the prohibitions of the act:

² *Id.* at 5 (quoting Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 567 (1987)).

³ *Id.* at 6 (quoting Forsythe, *supra* note 2, at 569).

⁴ *Id.*

⁵ Jon O. Shimabukuro, *The Unborn Victims of Violence Act*, CRS Report for Congress (May 21, 2004), available at http://assets.opencrs.com/rpts/RS21550_20040521.pdf (last visited Apr. 2, 2010).

⁶ The information in this section of the Present Situation of this bill analysis is from the CRS Report for Congress. *Id.*

⁷ See 18 U.S.C. s. 1841 and 10 U.S.C. s. 919a.

- Persons conducting consensual, legal abortions;
- Persons conducting any medical treatment of the pregnant woman or unborn child; and
- Any woman with respect to her unborn child.

State Law

Currently, 38 states have fetal homicide statutes. Twenty of those states' laws apply to the earliest stages of pregnancy.⁸ Some statutes use the definition found in the federal act discussed above ("a member of the species homo sapiens, at any stage of development, who is carried in the womb") while other states have defined "person" or "individual" to include an unborn child at every stage of gestation from fertilization to birth.⁹ Definitions vary among the states as do the requirements regarding knowledge of a woman's pregnancy and intent to harm or kill the fetus.

Florida Case Law

The term "viable fetus" is commonly used in abortion case law. For example, in 1989 the Florida Supreme Court stated that "the potentiality of life in the fetus becomes compelling at the point in time when the fetus becomes viable."¹⁰ Further, the court provided the following definition of viability:

Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures. Under current standards, this point generally occurs upon completion of the second trimester. [N]o medical evidence exists indicating that technological improvements will move viability forward beyond twenty-three to twenty-four weeks gestation within the foreseeable future due to the anatomic threshold of fetal development.¹¹

In *Stokes v. Liberty Mutual Insurance Co.*, the Florida Supreme Court used a medical dictionary definition of "quick" in its analysis of a wrongful death claim. This term was defined as follows: Pregnant with a child the movement of which is felt.¹² However, Justice Ervin offered a different definition of "quick child" in a concurring opinion in a case overturning a conviction for unlawful abortion. Specifically, Justice Ervin said that a woman is pregnant with a quick child "when the embryo (has) advanced to that degree of maturity where the child had a separate and independent existence, and the woman has herself felt the child alive and quick within her."¹³

⁸ The National Conference of State Legislatures, *Fetal Homicide Laws*, updated Nov. 2010, www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx. See also The National Right to Life Committee, *State Homicide Laws that Recognize Unborn Victims*, updated May 27, 2011, which cites 36 state laws, www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html.

⁹ For example, see *S.C. Code Ann section 16-3-1083*; *Tex.PenalCode section 1.07*; *Ala.Code section 13A-6-1*; *Ill.Rev.Stat. ch.720 sections 5/9-1.2, 2.1 and 3.2*.

¹⁰ *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989)

¹¹ *Id.* at 1194 (internal citation omitted).

¹² *Stokes v. Liberty Mutual Insurance Co.*, 213 So. 2d 695, 697 (Fla. 1968)

¹³ *Walsingham v. State*, 250 So. 2d 857 (Fla. 1971) (Ervin, J., specially concurring) (quoting *State v. Steadman*, 51 S.E.2d 91, 93 (1948)).

Florida Criminal Statutory Law

Murder of Viable Fetus. Section 782.09, F.S., provides that the unlawful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed *murder in the same degree* as that which would have been committed against the mother.

This statute holds a defendant equally accountable for the death of an unborn quick child as he or she would be if the mother died as a result of the defendant's actions. The crimes included in this section of law span from capital murder to manslaughter. The term "unborn quick child" is currently defined within this murder statute in accordance with the definition of "viable fetus" set forth in s. 782.071, F.S.

Murder of Viable Fetus by Vehicular Homicide. Section 782.071, F.S., which is Florida's *vehicular homicide* statute, holds a defendant equally accountable for the death of a viable fetus as for the death of the mother or any other person killed as a result of the defendant's actions. Specifically, Section 782.071, F.S., defines vehicular homicide as "the killing of a human being, or the killing of a viable fetus by any injury to the mother, caused by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another."

The term "viable fetus," is defined in the vehicular homicide statute as "a fetus (is viable) when it becomes capable of meaningful life outside the womb through standard medical measures." It is to this statutory definition that the other criminal statutes that punish the death of a fetus refer. This law also specifically recognizes a civil cause of action for damages under the Wrongful Death Act.¹⁴

Murder of Viable Fetus by DUI Manslaughter. Section 316.193(3), F.S., provides, in part, that in order to prove a *DUI manslaughter* case, the state must establish the following elements:

- The defendant operated a vehicle.
- The defendant, by reason of such operation, caused or contributed to the cause of the death of any human being or unborn quick child.
- At the time of such operation, the defendant was under the influence of alcoholic beverages or a controlled substance to the extent that the defendant's normal faculties were impaired or the defendant had a blood alcohol level of .08 or higher.

The statute defines the term "unborn quick child" in accordance with the definition of "viable fetus" set forth in s. 782.071, F.S.

III. Effect of Proposed Changes:

The bill cites the act as the "Florida Unborn Victims of Violence Act."

Change of Definition; No Action for Negligence. The bill amends s. 782.071, F.S. (the vehicular homicide statute), by replacing the term "viable fetus" with "unborn child," and

¹⁴ Section 768.19, F.S.

defining the term as “the unborn offspring of a human being at any stage of gestation from fertilization until birth.” The bill specifies that the statute should not be construed to create or expand any civil cause of action for negligence based on statute or common law.

Change of Definition; Specific Intent to Kill and Knowledge of Pregnancy Eliminated as Elements of Murder Offenses Against Unborn Child. The bill amends s. 782.09, F.S. (killing of unborn child by injury to the mother), by replacing the term “unborn quick child” with “unborn child” and defines the term in accordance with the amended definition in s. 782.071, F.S. (unborn child, vehicular homicide).

The bill also amends s. 782.09, F.S., to specify that the offense does not require the death of the mother or that the person engaging in the conduct:

- Had knowledge or should have had knowledge that the mother was pregnant; or
- Intended to cause the death of, or bodily injury to, the unborn child.

Change of Definition. The bill also amends s. 316.193, F.S. (DUI manslaughter), by replacing the term “unborn quick child” with “unborn child” and defining the term in accordance with the amended definition set forth in s. 782.071, F.S. (unborn child, vehicular homicide).

Conforming Changes; Effective Date. The bill also makes conforming changes to s. 435.04, F.S., relating to employment screening standards, and s. 921.0022, F.S., the offense severity ranking chart. The bill has an October 1, 2012, effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

On December 14, 2011, the Criminal Justice Impact Conference determined that this bill would have an insignificant prison bed impact on the Department of Corrections.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.