

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: SB 162

INTRODUCER: Senator Stargel

SUBJECT: Offenses Against Unborn Children

DATE: March 25, 2014

REVISED: \_\_\_\_\_

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<b>Favorable</b>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	<u>Cellon</u>	<u>Phelps</u>	<u>RC</u>	<b>Pre-meeting</b>

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**I. Summary:**

SB 162 creates the “Florida Unborn Victims of Violence Act.”

Current law considers certain offenses against pregnant women as separate offenses against a fetus. These offenses are the death of a viable fetus or unborn quick child through DUI manslaughter, vehicular homicide, and the killing of a fetus through an injury to the mother.

This bill creates new criminal offenses by:

- Creating a new, separate offense against an unborn child for criminal conduct causing injuries to or the death of the unborn child.<sup>1</sup>
- Providing that a separate offense results from injuries to an unborn child, not just the death of the unborn child as provided under current law in some circumstances.
- Expanding the class of unborn children who may be crime victims to include unborn children at any stage of fetal development, not just those unborn children who have reached the point of viability.<sup>2</sup>

The bill does not require that an assailant have the intent to injure or kill an unborn child or to know that the woman injured is pregnant.

Under the bill, the punishment for criminal conduct causing injuries to or the death of an unborn child is the same punishment that would apply if the injury or death occurred to the mother of the unborn child. However, the bill provides that the death penalty may not be imposed for an

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<sup>1</sup> This change is made in s. 775.021, F.S., which provides the rules of construction governing the criminal code.

<sup>2</sup> The expansion in the class of unborn children who may be crime victims results from changing existing statutory terms to unborn child from “viable fetus” or “unborn quick child.” These terms are used in several statutes providing criminal penalties for causing the death of a viable fetus or unborn quick child.

offense against an unborn child. As such, an offender may be charged with a penalty up to a life felony, punishable by life imprisonment.<sup>3</sup>

Consistent with the Federal Unborn Victims of Violence Act, this bill does not permit the prosecution of:

- Any person for conduct relating to an abortion for which the woman or her legal representative gave permission, or for which there was lawfully implied consent;
- Any person giving medical treatment to a pregnant woman or her unborn child; or
- Any woman with respect to her unborn child.

Section 782.071(3), F.S., currently creates a specific right of action for civil damages under tort law for deaths resulting from vehicular homicide, including the death of an unborn quick child. The bill may increase the number of wrongful death claims due to the change to unborn child from unborn quick child in the vehicular homicide law. The change in terminology eliminates the need to prove viability of the fetus or the length of pregnancy.

## II. Present Situation:

### History of Prenatal Criminal Law

Since at least the 17th century, the common law rule was that only children who were born alive were afforded protections of the criminal law.<sup>4</sup> This became known as the “born alive rule.” Due to the lack of medical technology at that time, doctors were unable to accurately ascertain the health or condition of an unborn child and therefore testify about whether an assault on the mother was the proximate cause of the death of the fetus.<sup>5</sup> The born alive rule became the standard in federal cases for crimes against a pregnant mother.<sup>6</sup>

Alternatively, some jurisdictions began adopting the rule that an unborn child is afforded criminal protection as a human being at the time of quickening, defined as the first recognizable movements of the fetus, and appearing temporally from about the 16th to 18th week of pregnancy.<sup>7</sup>

Some jurisdictions base protection of an unborn child at the point at which the fetus is viable.<sup>8</sup> Viability is considered to be the time at which a fetus can survive outside the womb.<sup>9</sup> The Massachusetts Supreme Court became the first court to include viable unborn children in the statutory meaning of “person” for purposes of criminal laws.<sup>10</sup>

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<sup>3</sup> Section 775.082(3)(a)3., F.S.

<sup>4</sup> 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, 3 (2006).

<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Id.*

Due to the advancement in technology and challenges to the born alive rule, many state legislatures have enacted changes to their criminal laws to penalize crimes perpetrated against unborn children.<sup>11</sup>

### **Federal Unborn Victims of Violence Act**

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.<sup>12</sup> When Congress enacted the UVVA, 26 states had already passed homicide laws that recognized unborn victims.<sup>13</sup> 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, the offender does not have to have knowledge of the victim’s pregnant condition or intent to cause the death of or bodily injury to the child in utero. The Act defines the term “child in utero” as “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”<sup>14</sup> The death penalty is not applicable to an offense under the UVVA.<sup>15</sup>

The UVVA specifically excludes from application of the Act:

- 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.<sup>16</sup>

The federal law was recently used in a Florida case to prosecute a man who tricked his pregnant girlfriend into taking a drug that caused her to lose their baby. John Andrew Welden pled guilty to federal mail fraud and conspiracy to commit product tampering, and the federal judge sentenced him to almost 14 years in prison.<sup>17</sup>

### **Other State Laws**

Currently, 38 states have fetal homicide laws. These states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and

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<sup>11</sup> *Id.* at 1.

<sup>12</sup> 18 U.S.C. s. 1841(a)(1), provides: “Whoever engages in conduct that ... causes the death of, or bodily injury ... to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense ... .”

<sup>13</sup> Alexis Gabrielson and Parker Milender, *Abortion*, 14 *Geo. J. Gender & Law* 213, 232 (2013).

<sup>14</sup> 18 U.S.C. s. 1841(d).

<sup>15</sup> 18 U.S.C. s. 1841(a)(2)(D).

<sup>16</sup> 18 U.S.C. s. 1841(c).

<sup>17</sup> Patty Ryan, *Welden gets nearly 14 years in Tampa abortion pill case*, TAMPA BAY TIMES, Jan. 27, 2014, available at <http://www.tampabay.com/news/courts/criminal/john-andrew-welden-faces-sentencing-in-tampa-abortion-pill-case/2162858>.

Wisconsin. Twenty-three of those 38 states have laws that apply to the earliest stages of pregnancy (“any state of gestation,” “conception,” “fertilization,” or “post-fertilization”).<sup>18</sup>

### **Florida Law**

Section 782.09, F.S., holds a criminal defendant accountable for the death of an unborn quick child as if the mother or any other person died as a result of the defendant’s actions. Homicide crimes included in this section are first degree (capital) murder, second degree murder, third degree murder, and manslaughter. For purposes of defining “unborn quick child,” this statute references the definition of “viable fetus” in s. 782.071, F.S. In that statute viability is defined as follows: “a fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures.”

Section 782.071, F.S., 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.

Section 316.193, F.S., Florida’s driving under the influence law, provides that a defendant who kills an unborn quick child as a result of committing DUI manslaughter is equally as culpable as if he or she killed any other human being. In defining the term “unborn quick child,” the statute references the definition of “viable fetus” in s. 782.071, F.S.

In 1989, the Florida Supreme Court defined the term viability as follows:

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.<sup>19</sup>

Although Florida law uses the definition of “viable fetus” to define “unborn quick child,” the specific term “unborn quick child” is not defined in statute similarly to how it has been defined by the courts. In *Stokes v. Liberty Mutual Insurance Co.*, the Florida Supreme Court used a medical dictionary definition of the term “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.”<sup>20</sup>

### **III. Effect of Proposed Changes:**

This bill creates the “Florida Unborn Victims of Violence Act.”

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<sup>18</sup> National Conference of State Legislatures, *Fetal Homicide Laws*, <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx>. Last visited February 12, 2014.

<sup>19</sup> *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989).  
1194 (internal citation omitted).

<sup>20</sup> *Stokes v. Liberty Mutual Insurance Co.*, 213 So. 2d 695, 697 (Fla. 1968), citing *Stedman’s Medical Dictionary* (2nd lawyers’ ed. 1966).

Current law considers certain offenses against pregnant women as separate offenses against a fetus. These offenses are the death of a viable fetus or unborn quick child through DUI manslaughter, vehicular homicide, and the killing of a fetus through an injury to the mother.

This bill creates new criminal offenses by:

- Creating a new, separate offense for criminal conduct causing injuries to or the death of an unborn child.<sup>21</sup>
- Providing that a separate offense results from injuries to an unborn child, not just the death of the unborn child as provided under current law in some circumstances.
- Expanding the class of unborn children who may be crime victims to include unborn children at any stage of fetal development, not just those unborn children who have reached the point of viability.<sup>22</sup>

Current law, in statutes authorizing criminal penalties or damages for the death of an unborn child, refer to a fetus in the womb as an “unborn quick child” or a “viable fetus.” Both terms are defined the same, and refer to a fetus that “becomes capable of meaningful life outside the womb through standard medical measures.”<sup>23</sup> The bill changes all references to an “unborn quick child” and a “viable fetus” to that of an “unborn child.” The bill tracks federal UVVA language in defining an unborn child as a member of the species *homo sapiens* at any stage of development.

Current law provides as a separate criminal offense the death of an unborn quick child or viable fetus during the commission of specified criminal offenses. Current offenses which punish an offender for causing the death of an unborn fetus are for DUI manslaughter (s. 316.193(3)(c)3., F.S.), vehicular homicide (s. 782.071, F.S.); and the killing of a fetus through injury to the mother (s. 782.09, F.S.). By changing terms in current law to unborn child, the bill expands the class of unborn children who may be considered to be crime victims. Additionally, the concept of punishing criminal conduct resulting in injuries to or the death of an unborn child at any stage of development will be applied uniformly throughout the statutes.

As intent is not required, this bill potentially expands the number of strict liability offenses. A strict liability offense is defined as an act that does not require *mens rea*, or intent.<sup>24</sup> Most crimes require some sort of intent. At common law, all crimes required intent. However, “it was long ago recognized that the legislature has the power to dispense with the element of intent and thereby punish particular acts without regard to the mental attitude of the offender.”<sup>25</sup>

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<sup>22</sup> The expansion in the class of unborn children who may be crime victims results from changing existing statutory terms to unborn child from “viable fetus” or “unborn quick child.” These terms are used in several statutes providing criminal penalties for causing the death of a viable fetus or unborn quick child.

<sup>23</sup> Section 782.071(2), F.S.

<sup>24</sup> Black’s Law Dictionary, 9th ed. (2009).

<sup>25</sup> *State v. Oxx*, 417 So. 2d 287, 289 (Fla. 5th DCA 1982).

offense against an unborn child. As such, an offender may be charged with a penalty up to a life felony, punishable by life imprisonment.<sup>26</sup>

This bill does not permit the prosecution of:

- Any person for conduct relating to an abortion for which the woman or her legal representative gave permission, or for which there was lawfully implied consent;
- Any person giving medical treatment to a pregnant woman or her unborn child; or
- Any woman with respect to her unborn child.

Section 782.071(3), F.S., currently creates a specific right of action for civil damages under tort law for deaths resulting from vehicular homicide, including the death of an unborn quick child. The bill may increase the number of wrongful death claims due to the change to unborn child from unborn quick child in the vehicular homicide law. The change in terminology effectively eliminates the need to prove viability the fetus or the length of pregnancy.

The bill takes effect October 1, 2014.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

The seminal cases on fetal homicide statutes are *Minnesota v Merrill*<sup>27</sup> and *People v. Ford*.<sup>28</sup> In *Minnesota v. Merrill*, the defendant brought a challenge before the state supreme court based on a conviction for the death of a fetus through the assault of a pregnant woman. The defendant was convicted in the shooting death of the pregnant woman. The state also charged him under a separate statute for the murder of an unborn child.<sup>29</sup>

The defendant challenge the state's fetal homicide law on equal protection and vagueness grounds. Under equal protection, the defendant alleged that the state treated the death of a fetus by a third party (himself) differently than the death of a fetus initiated by the

<sup>26</sup> Section 775.082(3)(a)3., F.S.

<sup>27</sup> *Minnesota v. Merrill*, 450 N.W. 2d 318 (MN 1990).

<sup>28</sup> *People v. Ford*, 581 N.E. 2d 1189 (Ill. 4th DCA 1991).

<sup>29</sup> *Id.* at 320.

pregnant woman's decision to abort her pregnancy.<sup>30</sup> The Court denied his equal protection claim in asserting that the women's right to privacy in terminating her pregnancy is a constitutionally-protected right.<sup>31</sup> This right is not extended to the defendant to terminate a woman's pregnancy.

The defendant also brought a vagueness challenge, alleging that the statute failed to give fair warning of the prohibited behavior and encouraged arbitrary and discriminatory enforcement.<sup>32</sup> Regarding the issue of fair warning, again the court ruled against the defendant, finding that "the possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude."<sup>33</sup> And on the question of arbitrariness, the court held that the "state must prove only that the implanted embryo ... in the ... womb was living, that it had life, and that it has life no longer."<sup>34</sup>

In *People v. Ford*, a defendant challenged Illinois' fetal homicide statute on equal protection and vagueness grounds.<sup>35</sup> The state presented evidence that the defendant physically assaulted a pregnant victim, with the intent to kill her fetus and that the fetus died shortly thereafter.<sup>36</sup>

The defendant argued that:

- The statute fails to distinguish between viable and nonviable fetuses and is inconsistent with the government recognizing a woman's right to terminate a pregnancy;<sup>37</sup> and
- The statute is unconstitutionally vague as the questions of life and death are philosophical and unable to be ascertained with certainty.<sup>38</sup>

The Illinois Fourth District Court of Appeal found unpersuasive the defendant's argument that a fetal homicide statute is incongruent with a woman's right to abortion, and further, that an assailant causing the death of a fetus and a physician conducting legal abortions are similarly situated in law. The Court reasserted the holding of the *Merrill* court, in citing that case law "protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."<sup>39</sup>

Regarding defendant's assertion of vagueness, the Court found that a person of ordinary intelligence can reasonably ascertain whether the conduct is lawful under the fetal infanticide law, and that the statute clearly criminalizes the death of a fetus from the time of fertilization, removing any question of a fetus being considered alive only upon birth.<sup>40</sup>

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<sup>30</sup> *Id.* at 321.

<sup>31</sup> *Id.* at 321-322.

<sup>32</sup> *Id.* at 322.

<sup>33</sup> *Id.* at 323.

<sup>34</sup> *Id.* at 324.

<sup>35</sup> *People v. Ford*, 581 N.E. 2d 1189 (Ill. 4th DCA 1991).

<sup>36</sup> *Id.* at 1191-1195.

<sup>37</sup> *Id.* at 1198.

<sup>38</sup> *Id.* at 1200.

<sup>39</sup> *Id.* at 1199, citing *Minnesota v. Merrill*, 450 N.W. 2d at 322.

<sup>40</sup> *Id.* at 1201-1202.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference met on January 30, 2014, and determined that this bill will have an indeterminate impact on prison beds.<sup>41</sup>

The Department of Corrections (DOC) concurs that the DOC will have an indeterminate fiscal impact, based on being unable to quantify an increase in prison sentences.<sup>42</sup>

The Office of the State Courts Administrator (OSCA) indicates that this bill will likely increase judicial workload in that a new criminal count is created, and also that causation of injury by the defendant to a fetus may increase litigation time.<sup>43</sup> However, OSCA could not quantify the fiscal impact.

The state may incur costs related to prosecution of fetal homicide or injury cases to the extent that more expert testimony is needed to prove causation between the defendant's actions and injury or death to a fetus. Also, the state may have to incur costs to prove that a victim was pregnant at the time of injury.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 316.193, 435.05, 775.021, 782.071, 782.09, and 921.0022.

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<sup>41</sup> Criminal Justice Impact Conference (January 30, 2014).

<sup>42</sup> Department of Corrections, *2014 Legislative Bill Analysis for SB 162* (October 1, 2014) (on file with the Senate Committee on Judiciary).

<sup>43</sup> Office of the State Courts Administrator, *2014 Judicial Impact Statement*, (February 10, 2014) (on file with the Senate Committee on Judiciary).



**IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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