

**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 Criminal Justice Committee

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BILL: SB 290

INTRODUCER: Senator Fasano

SUBJECT: Offenses Against Unborn Children

DATE: March 5, 2010

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	<b>Favorable</b>
2.			JU	
3.			JA	
4.				
5.				
6.				

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**I. Summary:**

Senate Bill 290 amends s. 782.071, F.S. (vehicular homicide), by replacing the term “viable fetus” with “unborn child.” It amends s. 782.09, F.S. (killing of unborn quick child by injury to mother) by replacing the term “unborn quick child” with “unborn child as set forth in s. 782.071.” The bill amends s. 316.193, F.S. (DUI manslaughter), by replacing the term “unborn quick child” with “unborn child as set forth in s. 782.071.”

The definition provided by the bill for the term “unborn child” as it is applied in the above-cited statutes mean “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”

In s. 782.09, F.S., the bill specifically eliminates any requirement that a perpetrator of a crime against a woman who is pregnant knew or should have known of her condition or that the perpetrator have any intent to cause injury or death of the unborn child.

This bill substantially amends the following sections of the Florida Statutes: 316.193, 435.03, 435.04, 782.071, and 782.09.

**II. Present Situation:**

Section 782.071, F.S., is the vehicular homicide statute. It 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 their actions. It contains the definition of “viable fetus” cited by other homicide statutes within the Florida Criminal Code. The term “viable fetus” is defined as follows: *a fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures.*

s. 782.071(2), F.S. This statute specifically recognizes a right of action for civil damages for deaths described therein in the Wrongful Death Act. s. 768.19, F.S.

Section 782.09, F.S., is the criminal law that prohibits the killing of an unborn quick child by injury to the mother. This statute also holds a defendant equally accountable for the death of the unborn quick child as he or she would have been if the mother or any other person died as a result of their actions. The homicide crimes included in this section of law span from capital murder to manslaughter. For purposes of defining “unborn quick child,” this statute references the definition of “viable fetus” in the vehicular homicide statute.

Section 316.193, F.S., contains the DUI manslaughter statute. 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 human being, under the DUI manslaughter statute. This section also refers to the definition of “viable fetus” in the vehicular homicide statute to define “unborn quick child” in this section of the law.

### **Viability of a Fetus Defined in Vehicular Homicide Statute**

As previously stated, a fetus is considered to be viable under the terms of s. 782.071, F.S., when “it becomes capable of meaningful life outside the womb through standard medical measures.” s. 782.071(2), F.S.

“Viable fetus” is a commonly used concept in the abortion case law. For example, in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), the court stated that “the potentiality of life in the fetus becomes compelling at the point in time when the fetus becomes viable.” Further, the court defined 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....(no 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). *Id.* at 1194. (citation omitted).

### **Case Law Definition of Unborn Quick Child**

The term “unborn quick child” is not defined in statute. In *Stokes v. Liberty Mutual Insurance Co.*, 213 So. 2d 695, 697 (Fla. 1968), the Florida Supreme Court used in its analysis of a wrongful death claim, a medical dictionary definition of “quick.” This term was defined as follows: “pregnant with a child the movement of which is felt.” However, Florida Supreme Court Justice Ervin offered a different definition in a concurring opinion in a case overturning a conviction for unlawful abortion. *Walsingham v. State*, 250 So. 2d 857 (Fla. 1971)(Ervin, J., specially concurring). Justice Ervin provided the following “quick child” definition: “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.” *Id.* (quoting other authority).

**Federal Law**

In 2004, the Unborn Victims of Violence Act (UVVA) was enacted. The UVVA amends title 18 of the U.S. Code and the Uniform Code of Military Justice to add new sections for the “protection of unborn children.” 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 phrase “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.”

**III. Effect of Proposed Changes:**

Senate Bill 290 amends s. 782.071, F.S. (vehicular homicide), by replacing the term “viable fetus” with “unborn child,” and specifies that that statute should not be construed to create or expand any civil cause of action for negligence based on statute or common law. The bill mirrors federal law by defining the term “unborn child” as *a member of the species homo sapiens, at any stage of development, who is carried in the womb.*

Section 782.09, F.S. (killing of unborn quick child by injury to mother) is amended by replacing the term “unborn quick child” with “unborn child as set forth in s. 782.071.” It also specifies that the offense does not require proof that the defendant knew or should have known that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death of, or bodily injury to, the unborn child.

The bill amends s. 316.193, F.S. (DUI manslaughter), by replacing the term “unborn quick child” with “unborn child as set forth in s. 782.071.”

It also amends ss. 435.03 and 435.04, F.S., relating to employment screening standards, and s. 921.0022, F.S., the offense severity ranking chart of the Criminal Punishment Code, to conform terminology.

**Other Potential Implications:**

Section 782.09(4), F.S., currently states that “this section does not authorize the prosecution of any person in connection with a termination of pregnancy pursuant to chapter 390.” While this serves to prevent prosecutions based upon the homicidal actions prohibited in that section of the criminal law, the amended definitions of terms could be relied upon in cases that reach beyond the criminal law.

**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:

Although it cannot be known how Florida courts would interpret and apply the statutes amended by this bill, an examination of cases from other states reveals that courts have declined to invalidate state fetal homicide statutes.

In *State v. Merrill*, the Minnesota Supreme Court concluded that the state's unborn child homicide statutes did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and were not unconstitutionally vague.<sup>1</sup> Merrill shot a woman who was pregnant with a twenty-seven or twenty-eight-day-old embryo. With respect to his equal protection claim, Merrill argued that the statutes subjected him to prosecution for ending a pregnancy while allowing a pregnant woman to terminate a nonviable fetus or embryo without criminal consequences.<sup>2</sup> Merrill contended that the statutes treated similarly situated persons differently.

The court rejected Merrill's equal protection claim on the grounds that the defendant and a pregnant woman are not similarly situated: "The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally authorized to perform the act."<sup>3</sup> Unlike the assailant who has no right to kill a fetus, the pregnant woman has a right to decide to terminate her pregnancy. The actions of the woman's doctor are based on the woman's constitutionally protected rights under *Roe v. Wade*.<sup>4</sup>

Merrill advanced two arguments for finding the statutes to be unconstitutionally vague. First, he contended that the statutes failed to give fair warning of the prohibited conduct. Merrill maintained that it was unfair to punish an assailant for the murder of an unborn child when neither he nor the pregnant woman may be aware of the pregnancy. However, the court found that the statutes provided fair warning based on the doctrine of transferred intent. The court noted that even if the offender did not intend to kill a particular victim, he should have fair warning that he would be held criminally accountable given that the same type of harm would result if another victim was killed.

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<sup>1</sup> See "The Unborn Victims of Violence Act" CRS Report for Congress, Jon O. Shimabukuro, *citing* 450 N.W.2d 318 (Minn. 1990).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See "The Unborn Victims of Violence Act" CRS Report for Congress, Jon O. Shimabukuro, *citing* 410 U.S. 113 (1973).

Merrill's second argument was that the statutes encouraged arbitrary and discriminatory enforcement by using the phrase "cause the death of an unborn child"<sup>5</sup> to identify prohibited conduct without actually defining when death may occur. Merrill believed that the failure to identify when death occurs for the unborn child would result in judges and juries providing their own definitions. Moreover, Merrill asserted that because an embryo is not alive, it could not experience death.

The court determined that to have life means "to have the property of all living things to grow, to become." The court avoided the question of whether the unborn child should be considered a person or human being. Instead, the court observed that criminal liability "requires only that the embryo be a living organism that is growing into a human being. Death occurs when the embryo is no longer living, when it ceases to have the properties of life." Thus, the trier of fact would simply have to determine whether an assailant's acts caused the embryo or unborn child to stop growing or stop showing the properties of life.

In *People v. Ford*, the Appellate Court of Illinois concluded similarly that the state's fetal homicide statute did not violate the Equal Protection Clause of the Fourteenth Amendment and was not unconstitutionally vague.<sup>6</sup> Like Merrill, Ford argued that the statute treated similarly situated people differently. While a pregnant woman could terminate her nonviable fetus without punishment, an assailant would face criminal penalties for killing such a fetus. Following the Minnesota Supreme Court, the Illinois court found that the defendant and a pregnant woman are not similarly situated.<sup>7</sup> In addition, the court determined that the statute could be upheld as rationally related to a legitimate governmental purpose. Because the statute did not affect a fundamental right held by the defendant, and because it did not discriminate against a suspect class, the validity of the statute could be considered under the rational basis standard of review. The court concluded that the statute was rationally related to a legitimate governmental interest in protecting the potentiality of human life.<sup>8</sup>

Ford's vagueness argument focused on the statute's use of the phrase "cause the death of an unborn child."<sup>9</sup> Ford contended that the absence of statutory definitions for when life begins and death occurs would result in the application of subjective definitions by the trier of fact, and lead to the arbitrary and discriminatory enforcement of the statute.<sup>10</sup> Citing *Merrill*, the court maintained that the trier of fact would be required only to determine whether there was an embryo or fetus that was growing into a human being, and whether because of the acts of an assailant, that growing was stopped. The statute did not require the trier of fact to apply its subjective views.

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<sup>5</sup> Minnesota statute 609.266, defines "unborn child" as "the unborn offspring of a human being conceived, but not yet born."

<sup>6</sup> See "The Unborn Victims of Violence Act" CRS Report for Congress, Jon O. Shimabukuro, *citing* 581 N.E.2d 1189 (Ill.1991).

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

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

<sup>9</sup> Illinois defines "unborn child" as "any individual of the human species from fertilization until birth." Ch. 38 12-3.1.

<sup>10</sup> See "The Unborn Victims of Violence Act" CRS Report for Congress, Jon O. Shimabukuro, *citing* 581 N.E.2d 1189 (Ill.1991).

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

The Criminal Justice Impact Conference considered this bill at its meeting on February 23, 2010 and found that it was likely to have an unquantifiable prison bed impact.

**VI. Technical Deficiencies:**

The language as set forth on page 4, lines 94-99 of the bill may be misconstrued beyond the intent of the bill sponsor. It could be read to mean that a person who had no knowledge of a victim's pending pregnancy and no intent to murder the unborn child could be charged and convicted of the *specific intent to kill* act of capital murder (s. 782.04(1)(a)1., F.S.).

It is suggested that this revision could provide clarity: (6) Unless otherwise required by the elements of the crime, an offense under this section does not require that a person engaging in the conduct: with (a) and (b) as set forth in the bill unchanged.

**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.