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 Committee on Criminal Justice

BILL:	SB 876
INTRODUCER:	Senator Stargel
SUBJECT:	Offenses Against Unborn Children
DATE:	April 2, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davlantes	Stovall	HP	**Fav/1 amendment**
2.	Cellon	Cannon	CJ	**Pre-meeting**
3.			JU	
4.			AP	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	☐	Statement of Substantial Changes
B. AMENDMENTS.....	☐	Technical amendments were recommended
	☒	Amendments were recommended
	☐	Significant amendments were recommended

I. Summary:

SB 876 states that anyone who commits a crime causing bodily injury to or death of an unborn child commits a separate offense from any offenses committed against the mother of that child, and offenses committed against such a child are punished as if they had been committed against the pregnant mother. Assigning punishment for an offense against an unborn child does not require proof that the perpetrator had or should have had knowledge of the pregnancy or that he or she intended to cause death or harm to the child.

Notwithstanding any other provision of law, the death penalty may not be imposed for an offense against an unborn child. Nor does this bill 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.

The bill defines "unborn child" to mean any member of the species *Homo sapiens* at any stage of development who is carried in the womb. The bill also changes all statutory references to

"unborn quick child" and "viable fetus" to "unborn child" and provides cross-references to the previously mentioned definition.

The bill provides an effective date of October 1, 2013.

This bill substantially amends the following sections of the Florida Statutes: 775.021, 316.193, 435.05, 782.071, 782.09, and 921.022

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 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]

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[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).
[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 March 14, 2013).

Federal Unborn Victims of Violence Act[6]

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." The death penalty is not applicable to an offense under the UVVA.[8]

In an attempt to preserve a woman's right to have an abortion, there are three specific exclusions from the prohibitions 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.

Currently, 38 states, including Florida, have fetal homicide laws. Twenty-three states, not including Florida, have fetal homicide laws that apply to the earliest stages of pregnancy ("any state of gestation," "conception," "fertilization" or "post-fertilization").[9]

Florida Law

Section 782.09, F.S., is specifically aimed at holding a defendant equally accountable for the death of an unborn quick child as he or she would have been if the mother or any other person died as a result of the defendant's actions. The 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.

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. Section 316.193, F.S., 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. For purposes of defining "unborn quick child," the statute references the definition of "viable fetus" in s. 782.071, F.S.

[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.
[8] 18 U.S.C. s. 1841(a)(2)(D).
[9] National Conference of State Legislatures, *Fetal Homicide Laws*, http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx . Last visited on March 14, 2013.

The term "viable fetus" is defined in s. 782.071(2), F.S., which states: "a fetus is viable when it becomes capable of meaningful life outside the womb through standard medical measures."[10]

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."[11] 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.[12]

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 "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.[13] 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."[14]

III. Effect of Proposed Changes:

Section 1 provides a short title for the bill, the Florida Unborn Victims of Violence Act.

Section 2 adds a subsection to s. 775.021, F.S., related to the rules of construction for the Florida Criminal Code, to state that anyone who commits a crime that causes bodily injury to or death of an unborn child commits a separate offense from any offenses committed against the mother of that child.

Accordingly, under this provision, offenses that injure an unborn child would become chargeable offenses on par with the homicide offenses that are chargeable under current law. Injury to the unborn child, an element of violent crimes such as battery or aggravated battery, would likely require some delay in prosecution of these crimes and almost certainly will require medical expert testimony.

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[10] The term "viable fetus" is commonly used in abortion case law.
[11] *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989)
[12] *Id*. at 1194 (internal citation omitted).
[13] *Stokes v. Liberty Mutual Insurance Co.*, 213 So. 2d 695, 697 (Fla. 1968)
[14] *Walsingham v. State*, 250 So. 2d 857 (Fla. 1971) (Ervin, J., specially concurring) (quoting *State v. Steadman*, 51 S.E.2d 91, 93 (1948)).

Any offense committed against an unborn child is punished as if that offense had been committed against the pregnant mother. However, notwithstanding any other provision of law, the death penalty may not be imposed for an offense against an unborn child.

The bill states that an offense against an unborn child does not require proof that the perpetrator had or should have had knowledge of the pregnancy or that he or she intended to cause death or harm to the child. This removes the intent element from any crime against an unborn child.

The new subsection 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.

The bill defines "unborn child" to mean any member of the species *Homo sapiens* at any stage of development who is carried in the womb. This definition eliminates any issues of proof regarding the viability or length of a pregnancy.

Section 3 amends s. 316.193, F.S., concerning penalties for driving under the influence, to change any references to "unborn quick child" to simply "unborn child." It also provides a cross-reference to the definition of "unborn child" which the bill adds to s. 775.021, F.S.

Section 4 amends s. 435.05, F.S., concerning employment screening, to change the term "unborn quick child" to "unborn child."

Section 5 amends s. 782.071, F.S., concerning vehicular homicide, to define "vehicular homicide" as the killing of a human being or of an unborn child (rather than of a viable fetus) by and injury to the mother. It also provides a cross-reference to the definition of "unborn child" which the bill adds to s. 775.021, F.S.

Section 6 amends s. 782.09, F.S., concerning the unlawful killing of an unborn child by injuries to the mother, to change all references to "unborn quick child" to "unborn child." It also provides a cross-reference to the definition of "unborn child" which the bill adds to s. 775.021, F.S.

Section 7 amends s. 921.022(3), F.S., Level 7 of the Criminal Punishment Code, to change a reference to "viable fetus" to "unborn child" to correspond with changes made earlier in the bill related to vehicular homicide.

Section 8 provides an effective date of October 1, 2013.

Other Potential Implications:

Under current law, s. 782.071(3), F.S., creates a specific right of action for civil damages under s. 768.19, F.S.,"under all circumstances, for all deaths" described in the vehicular homicide statute. As previously explained, the vehicular homicide statute currently contains the term "viable fetus." This bill may necessarily increase the number of wrongful death claims due to the change in the law which eliminates proof regarding viability or length of pregnancy.[15]

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:

This bill eliminates the use of the terms "unborn quick child" and "viable fetus" within Florida's criminal laws, and replaces them with "unborn child." The bill provides that an "unborn child" is "a member of the species *homo sapiens*, at any stage of development, who is carried in the womb." This is the same definition used in the federal Unborn Victims of Violence Act (UVVA or act).

Similarly, Illinois' and Minnesota's prenatal criminal laws mirror the UVVA. Courts in Illinois and Minnesota have addressed the constitutionality of their state's prenatal criminal laws and have declined to invalidate them. Although it cannot be known how Florida courts would interpret and apply the changes made by this bill, an examination of the cases from Illinois and Minnesota may provide some guidance as to how a court in Florida may consider a similar case.

In *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990), 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. Merrill shot a woman who was pregnant with a 27- or 28-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. Merrill contended that the statutes treated similarly situated persons differently.

[15] The text of s. 768.19, F.S., refers to the death or injury of a "person."

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." 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*.[16]

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.

Merrill's second argument was that the statutes encouraged arbitrary and discriminatory enforcement by using the phrase "cause the death of an unborn child"[17] 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*, 581 N.E.2d 1189 (Ill. App. Ct. 1991), the Fourth District 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. Like in *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. 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

[16] *Roe v. Wade*, 410 U.S. 113 (1973).
[17] Minnesota defines "unborn child" as "the unborn offspring of a human being conceived, but not yet born." See M.S.A. s. 609.266.

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.

Ford's vagueness argument focused on the statute's use of the phrase "cause the death of an unborn child."[18] 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. 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.

Finally, Ohio's prenatal criminal legislation was challenged on Eighth Amendment grounds in *Coleman v. DeWitt*, 282 F.3d 908 (6th Cir. 2002). The Eighth Amendment not only protects individuals from cruel and unusual punishment, but also from sentences that are disproportionate to the committed crime. The United States Supreme Court set out a three-prong test for determining whether a sentence is disproportionate.[19] The first prong requires an examination of the gravity of the offense and the harshness of the penalty given. The second prong compares the defendant's sentence to the sentences of other criminals in the same jurisdiction convicted of the same offense. The final prong requires the court to examine how the same crime is treated in other jurisdictions.[20]

The court in *Coleman*, found that the defendant's sentence was not grossly disproportionate to the crime committed and therefore did not violate the Eighth Amendment. Specifically, the court held:

> Coleman's sentence of nine years for involuntary manslaughter is far from the "gross disproportionality" required to offend the Eighth Amendment. Coleman's actions were violent and deprived Williams of her child, or at least the ability to exercise her rights over her pregnancy. At least as important as a woman's right to terminate her pregnancy is her right to choose to carry her child to term. In a jurisprudence that finds mandatory life sentences for the non-violent possession of cocaine constitutionally permissible, we would be hard-pressed to find nine years for Coleman's violent act beyond the constitutional pale. Indeed, the Supreme Court has never held unconstitutional a sentence less severe than life imprisonment without the possibility of parole.[21]

One legal scholar has also done a more extensive analysis on whether a constitutional challenge against the UVVA would survive or not. This scholar found that prosecutions

[18] Illinois defines "unborn child" as "any individual of the human species from fertilization until birth." See 720 IlCS 5/9-1.2.
[19] *See Solem v. Helm*, 463 U.S. 277 (1983).
[20] Falvey, Jr., *supra* note 1, at 24.
[21] *Coleman*, 282 F.3d at 915 (internal citations omitted).

under the UVVA do not appear to constitute cruel and unusual punishment in violation of the Eighth Amendment.[22]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Perpetrators of crimes against unborn children at any stage of development may be prosecuted.

C. Government Sector Impact:

The Criminal Justice Impact Conference met on February 27, 2013, and determined that the bill would have an indeterminate impact upon the Department of Corrections.[23]

The Florida Prosecuting Attorney's Association submitted the following explanation regarding potential fiscal impact to the state attorneys: "The change in definition has the potential for an additional workload for the prosecutors especially in DUI Manslaughters, Agg Batteries and Domestic Batteries, etc. This type of case may require expenditure of tax dollars for experts on cause of death of the "unborn" child as we will need to show direct connection between the act and "unborn" child's death with no intervening factors such as mother's health, care, etc."[24]

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.

[22] *See* Falvey, Jr., *supra* note 1, at 17, 24-27.
[23] Criminal Justice Impact Conference, *Impact of SB 876- Offenses Against Unborn Children*. A copy is on file with the Senate Health Policy Committee.
[24] Florida Prosecuting Attorney's Association, projected fiscal impact, March 4, 2013. On file with Senate Criminal Justice Committee staff.

B. Amendments:

Barcode 714942 by Health Policy on March 20, 2013:
The amendment removes the short title of the bill. (WITH TITLE AMENDMENT)