SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 24, 1998 Revised: _____ _____ _____ _____

Subject: Vehicular homicide of a viable fetus

	Analyst	Staff Director	Reference	Action
1.	Gomez	Miller	CJ	Favorable/CS
2.			WM	
3.				
4.				
5.				

I. Summary:

Currently, if a fetus is born alive and then dies as a result of a defendant's reckless driving, the defendant is subject to prosecution for vehicular homicide, or any other applicable homicide statute under the "born alive doctrine." However, if a viable fetus dies in the womb, a vehicular homicide prosecution is not permissible because the unborn fetus is not considered a "human being" under the "born alive doctrine." The committee substitute adds the phrase "killing of a viable fetus" to the vehicular homicide statute. The effect will be to allow prosecution and punishment of a defendant whose reckless driving causes the death of a viable fetus.

A defendant convicted of killing a viable fetus by vehicular homicide commits a third-degree felony and would be subject to 5 years imprisonment. This is the same penalty authorized for the vehicular homicide for killing a human being.

The committee substitute requires the prosecution to prove that a fetus was at the stage of development where it was viable under Florida law in order to obtain a conviction. The committee substitute defines the phrase "viable fetus" as "that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures."

The committee substitute establishes a right of action for civil damages under s. 768.19, F.S., the Wrongful Death Act, "under all circumstances, for all deaths described" in the vehicular homicide statute. The effect will be to expand the wrongful death cause of action to include the death of a "viable fetus," when the death stems from vehicular homicide.

The committee substitute substantially amends the following section of the Florida Statutes: 782.071.

II. Present Situation:

A. Vehicular homicide is the reckless killing of a human being by operation of a car

Vehicular homicide is the killing of a **human being** by the operation of a motor vehicle in a **reckless** manner likely to cause the death of, or great bodily harm to another. s. 782.071, F.S. Vehicular homicide is punished as a third-degree felony (5 year maximum sentence).

The reckless element required to prove vehicular homicide is a lesser standard than the **culpable negligence** standard required for proof under the manslaughter statute, s. 782.07, F.S., *McCreary v. State*, 371 So. 2d 1024, 1026 (Fla. 1979). Manslaughter, which can also serve as a basis for a charge against a driver, is punished as a second-degree felony (15 year maximum sentence). Culpable negligence under manslaughter requires proof of a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences." *Id*. The court has defined recklessness under the vehicular homicide statute as that "where the degree of negligence falls short of culpable negligence but where the degree of negligence is more than a mere failure to use ordinary care." *Id*.

In *McCreary*, the court held that the state established the reckless element in vehicular homicide where the defendant ran a stop sign causing the death of one of his passengers and the evidence showed that the stop sign was clearly visible from a distance of 300 to 400 feet; the defendant, (although not intoxicated), had consumed several glasses of beer just prior to the accident, and the defendant drove into the intersection without slowing down. *Id*. at 1025.

However, momentary inattentiveness alone is insufficient to support a reckless driving or vehicular homicide conviction. *State v. Esposito*, 642 So. 2d 25 (Fla. 4th DCA 1994). In *Esposito*, the defendant, a bus driver, struck and killed a pedestrian in a crosswalk, had an unobstructed view, was traveling at only 15 mph, and an expert concluded that the defendant failed to look for pedestrians and was not paying attention. If the state is only able to show a failure to use ordinary care, then it will not obtain a conviction for vehicular homicide. *Id*.

Vehicular homicide should also be contrasted with DUI manslaughter. DUI manslaughter occurs when the defendant's DUI (driving while impaired or with an unlawful blood-alcohol level) causes the death of any **human being**. s. 316.193(3)(c)3, F.S. DUI manslaughter is punished as a second-degree felony. *Id*.

B. "Born alive doctrine" establishes when a fetus becomes a human being

"Human being" is not defined in statutes, consequently, the courts have adopted a common law principle known as the "born alive doctrine" to address whether, for purposes of a homicide prosecution, a fetus is a human being. *State v. Gonzalez*, 467 So. 2d 723 (Fla. 3rd DCA 1985). The born alive doctrine holds that the killing of a fetus is not homicide unless the child is born

alive and then dies as a result of the injuries previously sustained. *Gonzalez*, at 725; *State v. Ashley*, 670 So. 2d 1087 (Fla. 2d DCA 1996) *quashed in part on other grounds*, Nos. 87719, 87750 (Fla. Oct. 30, 1997).

If the fetus is born alive, then the defendant is subject to prosecution for vehicular homicide, or any other applicable homicide statute under the born alive doctrine. As a result, a defendant may not be convicted of homicide when a fetus is stillborn.

In *State v. McCall*, 458 So. 2d 875 (Fla. 2d DCA 1984), the driver was involved in an automobile accident resulting in the death of a woman in labor with a full-term viable fetus. The woman died, however, the fetus was stillborn, "having never lived independently of his mother's body and never having a heartbeat or breath after delivery by Caesarean section." *Id*. at 876. The court affirmed the convictions for vehicular homicide and DUI manslaughter for the death of the mother, but reversed the convictions for the death of the viable full-term fetus. *Id*. The court stated, "we hold that in Florida there are not such crimes as vehicular homicide and DWI manslaughter of a viable but unborn child." *Id*. at 877.

C. Willful killing of unborn quick child currently prohibited; definitions

Section 782.09, F.S., addresses the killing of an "unborn quick child" where the killing is "willful." That statute provides, "[t]he willful 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 manslaughter, a felony of the second degree...."

The term "unborn quick child" is not defined in this statute nor have the court's defined "unborn quick child" for purposes of this 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).

"Viable fetus," the phrase used in the committee substitute, 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).

D. Wrongful Death Act does not allow action for death of viable fetus.

Sections 768.16 - 768.27, F.S., contain the "Florida Wrongful Death Act," enacted in 1972. Section 768.19, F.S., provides a right of action when the death of a "person" is caused by a "wrongful act, negligence, default, or breach of contract or warranty." Beginning with *Stern v. Miller*, 348 So.2d 303 (Fla. 1977), the Florida Supreme Court has consistently held that a viable fetus is not a "person" within the meaning of s. 768.19, F.S. Most recently, in *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997), the court reaffirmed that "there is no cause of action for the death of a stillborn fetus."

Section 768.21, F.S., contains a list of damages that are to be awarded beneficiaries, e.g., each parent of a deceased minor child may recover for mental pain and suffering from the date of the injury. Section 768.21, F.S., contains no authorization for collection of damages resulting from the death of a viable fetus. This was mentioned as a basis for the court's holding in *Stern, supra*.

III. Effect of Proposed Changes:

A. Vehicular homicide expanded to include death of a viable fetus

Currently, if a fetus is born alive and then dies as a result of a defendant's reckless driving, the defendant is subject to prosecution for vehicular homicide, or any other applicable homicide statute under the "born alive doctrine." However, if a viable fetus dies in the womb, a vehicular homicide prosecution is not permissible because the unborn fetus is not considered a "human being" under the "born alive doctrine." The committee substitute adds the phrase "killing of a viable fetus" to the vehicular homicide statute. The effect will be to allow prosecution and punishment of a defendant whose reckless driving causes the death of a viable fetus.

A defendant convicted of killing a viable fetus by vehicular homicide commits a third-degree felony and would be subject to 5 years imprisonment. This is the same penalty authorized for vehicular homicide for killing a human being. These penalties may be enhanced to a second-degree felony (15 year maximum sentence) if the defendant knew or should have known that the accident occurred and he or she failed to give information or render aid as required by law.

B. Prosecution must prove fetus was capable of meaningful life outside the womb

The committee substitute defines the phrase "viable fetus" as "that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures." This definition is taken from the Florida Supreme Court's decision in *In re T.W.*, 551 So. 2d 1186,

1194 (Fla. 1989). See "Present Situation", p.3. The committee substitute requires the prosecution to prove that a fetus was at the stage of development where it was viable under Florida law in order to obtain a conviction. As indicated by the court's opinion, under current standards, viability usually occurs by the end of the second trimester. *Id*.

C. Wrongful death action expanded to include death of viable fetus

The committee substitute establishes a right of action for civil damages under s. 768.19, F.S., the Wrongful Death Act, "under all circumstances, for all deaths described" in the vehicular homicide statute. Currently, such an action exists for the deaths of a living person, but not for the death of a viable fetus. The effect will be to expand the wrongful death cause of action to include the death of a "viable fetus," when the death stems from vehicular homicide.

The courts have consistently held that Florida's Wrongful Death Act does not provide a cause of action for the death of a viable fetus. *See Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997); "Present Situation", p.4. If a plaintiff is able to establish that the defendant caused the death of a viable fetus by committing vehicular homicide, the committee substitute allows for the wrongful death action. However, it is unclear how a court will authorize damages since the damages provisions in the Wrongful Death Act, s. 768.21, F.S., do not relate to damages for a viable fetus.

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 committee substitute provides penalties for a vehicular homicide resulting in the death of a viable fetus which are identical to the penalties currently provided for a vehicular homicide which results in the death of a human being. In *Smith v. Newsome, supra*, the defendant contended that the Georgia feticide statute was unconstitutional "because the statute contradicts the Supreme Court decision *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)." In rejecting this argument, the court stated, "[t]he proposition that Smith relies upon in *Roe v. Wade*--that an unborn child is not a 'person' within the meaning

of the Fourteenth Amendment- is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus." *Id*.

So long as the legislature does not provide penalties which are cruel or unusual or infringe on a woman's constitutional right to choose an abortion, the question of whether to criminally sanction the destruction of a fetus is one of policy. *See Love v. State*, 450 So. 2d 1191 (Fla. 4th DCA 1984)(in overturning conviction for aggravated battery on a fetus on the grounds that fetus is not a "person" as that term is used in the battery statutes, the court stated, "[t]he State of Florida may certainly protect the mother and the unborn fetus from violence of the sort involved in this case and legislation to this effect is encourage."); *State v. Ashley*, Nos. 87719, 87750 (Fla. Oct. 30, 1997)(in holding that the common law immunity given to a woman for the self-destruction of her fetus has not been changed by statute, the court acknowledged that the legislature could make such a change if it chose to do so.)

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that the committee substitute expands the wrongful death statute by allowing for an action for the death of a viable fetus, defendants and their insurers may now become liable when they commit vehicular homicide under these circumstances.

C. Government Sector Impact:

The Criminal Justice Estimating Conference reviewed the committee substitute's house companion (HB 1269) on April 7, 1997. The Conference determined that HB 1269 will have no fiscal impact on the state prison beds.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.