

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 1038

SPONSOR: Judiciary Committee, Criminal Justice Committee and Senator Sanderson

SUBJECT: Homicide of an Unborn Child

DATE: April 18, 2001                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	<u>Forgas</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>APJ</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

The committee substitute expands the scope of s. 316.193(3), F.S., relating to driving under the influence, to include the death of an “unborn quick child” within the definition of DUI manslaughter.

The committee substitute redefines the definition of vehicular homicide found in s. 782.071, F.S., with regard to the death of a fetus, by replacing the term “a viable fetus” with the term “an unborn quick child.”

The bill expands the application of s. 782.09, F.S. Currently, that section punishes the *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” as manslaughter, a second degree felony. The bill creates new subsections which would punish the *unlawful* killing of an unborn quick child by any injury to the mother at the same level as if the mother had died.

In other words, if a person kills a fetus by an act which would constitute first degree murder if the act were committed against the mother and she died, the offender could be charged with first degree murder for the death of the fetus. The same is true in cases of second and third degree murder, and manslaughter under the provisions of the bill. The bill specifies that the death of the mother resulting from the same act or criminal episode which caused the death of the fetus shall not bar prosecution for the death of the fetus.

Section 782.09, F.S., is further amended to provide that it does not authorize the prosecution of any person in connection with a termination of pregnancy pursuant to chapter 390. Additionally, a claim for civil damages for the death of an unborn quick child is expressly allowed.

The bill reenacts portions of the Criminal Punishment Code and the definition of “crime” under the Florida Crimes Compensation Act, for purposes of incorporating the provisions of the bill by reference.

This bill substantially amends or reenacts the following sections of the Florida Statutes: 782.071, 782.09, 921.022, and 960.03.

## II. Present Situation:

### Vehicular Homicide and DUI Manslaughter

Section 782.071, F.S., currently allows prosecution and punishment of a defendant whose reckless driving causes the death of a human being or the death of a viable fetus by any injury to the mother. Vehicular homicide is a second degree felony, punishable by up to 15 years imprisonment, although it may be a first degree felony under certain circumstances such as failing to render aid or provide information when the defendant knew or should have known that the accident occurred.

The vehicular homicide statute conveys a right of action for civil damages under the Wrongful Death Act, s. 768.19, F.S.

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.*

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

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(3), 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).

### **Willful Killing of Unborn Quick Child**

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).

### **“Fetal Death” Defined in Chapter 382 – Vital Statistics**

Section 382.002(5), F.S., defines “fetal death” as “death prior to the complete expulsion or extraction of a product of human conception from its mother if the 20<sup>th</sup> week of gestation has been reached and the death is indicated by the fact that after such expulsion or extraction the

fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.” *Id.*

### **First Degree Murder**

As defined in s. 782.04(1)(a), F.S., murder in the first degree is the unlawful killing of a human being

- when perpetrated from a premeditated design to effect the death of the person killed or any human being;
- when committed by a person engaged in the perpetration of or the attempt to perpetrate any of the following crimes:
  - trafficking offenses prohibited in s. 893.135(1), F.S.
  - arson
  - sexual battery
  - robbery
  - burglary
  - kidnapping
  - escape
  - aggravated child abuse
  - aggravated abuse of an elderly person or disabled adult
  - aircraft piracy
  - unlawful throwing, placing, or discharging of a destructive device or bomb
  - carjacking
  - home-invasion robbery
  - aggravated stalking
  - murder of another human being
- or which resulted from the unlawful distribution of certain controlled substances under certain circumstances.

Murder in the first degree is a capital offense punishable by death or life imprisonment.  
s. 775.082, F.S.

### **Second Degree Murder**

As defined in s. 782.04(2), F.S., second degree murder is the unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.

Second degree murder may also be charged when a person is killed in the perpetration of or the attempt to perpetrate the crimes listed above (under the definition of first degree murder), by a person other than the one perpetrating or attempting to perpetrate those crimes. s. 782.04(3), F.S.

Second degree murder is a first degree felony punishable by a term of years not exceeding life imprisonment.

### **Third Degree Murder**

Section 782.04(4), F.S., defines third degree murder as the unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony *other than* those enumerated above under the definition of first degree murder.

Third degree murder is a second degree felony, punishable by up to fifteen years imprisonment. s. 775.082, F.S.

### **Manslaughter**

As defined in s. 782.07, F.S., manslaughter is defined as the killing of a human being by the act, procurement, or culpable negligence of another. As discussed above (see **Vehicular Homicide and DUI Manslaughter**), 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.” *McCreary v. State*, 371 So. 2d 1024, 1026 (Fla. 1979).

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

### **Vehicular Homicide and DUI Manslaughter**

The committee substitute amends s. 316.193(3), F.S., to include the death of an “unborn quick child” as falling within the definition of DUI manslaughter.

The definition of Vehicular Homicide in s. 782.071, F.S., is amended to replace the term “a viable fetus” with the term “an unborn quick child.” Additionally, subsection (3) of s. 782.071, F.S., is deleted from the bill, the effect of which is to redefine when a fetus is considered to be viable for purposes of the crime of Vehicular Homicide. Currently, the definition states “a fetus is viable *when it becomes capable of meaningful life outside the womb through standard medical measures.*” The bill would change the term “a viable fetus” to “an unborn quick child,” a term which is not currently defined in statute, but which has been interpreted by the courts in various ways.

In *Stokes v. Liberty Mutual Insurance Co.*, 213 So. 2d 695, 697 (Fla. 1968), the Florida Supreme Court used in its analysis of a civil 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 criminal 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).

### **Killing of Unborn Child by Injury to Mother**

The bill amends s. 782.09, F.S., to remove the element of “*willful* killing” from the crime of killing an unborn child by injury to the mother, and replacing that language with the term “*unlawful*.”

The bill also creates, where the victim is an “unborn quick child,” new crimes of: (1) murder in the first degree constituting a capital offense; (2) murder in the second degree constituting a first degree felony punishable by up to life imprisonment; and (3) murder in the third degree constituting a second degree felony punishable by up to fifteen years. The statute currently punishes the 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 the mother, as manslaughter constituting a second degree felony punishable by up to fifteen years imprisonment.

The term “unborn quick child” is not defined in this section of the bill, nor in the statute as it is currently written. Under Florida case law, the definition seems to be a fluid concept. One definition offered by the Supreme Court is “pregnant with a child the movement of which is felt.” *Stokes v. Liberty Mutual Insurance Co.*, 213 So.2d 695, 697 (Fla. 1968). Justice Ervin, specially concurring in *Walsingham v. State*, 250 So.2d 857 (Fla. 1971), offered the following 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.”

The bill specifies that the death of the mother resulting from the same act or criminal episode which caused the death of the fetus shall not bar prosecution for the death of the fetus. This section of the bill specifically does not authorize the prosecution of any person in connection with a termination of pregnancy pursuant to chapter 390. A claim for civil damages for the death of an unborn quick child is expressly allowed.

The bill reenacts portions of the Criminal Punishment Code and the definition of “crime” under the Florida Crimes Compensation Act, for purposes of incorporating the provisions of the bill by reference.

#### **IV. Constitutional Issues:**

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

None.

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

None.

##### **C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

The Criminal Justice Estimating Conference has determined that the enactment of this bill would create an insignificant impact on the number of prison beds needed to punish offenders who are guilty of violating these new laws.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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