

GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2011

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 215 (Second Edition)
SHORT TITLE: Unborn Victims of Violence Act/Ethen's Law.
SPONSOR(S): Representatives Starnes, Hilton, Steen, and Folwell

Table with columns: FISCAL IMPACT, Yes (X), No (), No Estimate Available (), FY 2011-12, FY 2012-13, FY 2013-14, FY 2014-15, FY 2015-16. Rows include EXPENDITURES (Correction, Probation, Judicial) and PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED.

FISCAL SUMMARY:

Since the proposed section creates new offenses, the Sentencing Commission does not have any historical data from which to estimate the impact of proposed legislation on the prison population.

To the extent that the proposed legislation results in an increase in the most serious charges faced by an offender or in an increase in the number of defendants facing criminal charges, the Administrative Office of the Courts (AOC) and the Office of Indigent Defense Services (IDS) would anticipate a corresponding increase in workload.

BILL SUMMARY:

The proposed legislation would create separate offenses for killing or causing injury to an unborn child and for assaulting a pregnant woman. The act becomes effective December 1, 2011, and applies to offenses committed on or after that date.

Source: Adopted from Committee Counsel's Summary dated 03/21/2011.

ASSUMPTIONS AND METHODOLOGY:

General

The Sentencing and Policy Advisory Commission prepares prison population projections for each bill containing a criminal penalty. The Commission assumes for such bills that expanding existing, or creating new criminal offenses produces no deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume deterrent effects for any criminal penalty bill.

The Administrative Office of the Courts provides Fiscal Research with a fiscal impact analysis for most criminal penalty bills. For such bills, fiscal impact is typically based on the assumption that court time will increase due to anticipated increases in trials and corresponding increases in workload for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Section 1:

This section provides a title for the act.

Impact: Section 1 does not impose a fiscal impact to the State.

Section 2:

This section creates an "Unborn Victims" Article in Chapter 14 of the General Statutes, and defines "unborn child" as a member of the species homo sapiens, at any stage of development, who is carried in the womb (in utero).

The act provides murder offenses for causing the death of an unborn child, in three separate instances:

1. Intentional: requires the willful and malicious commitment of an act with the intent to cause the death of the unborn child;
2. Inherently dangerous: requires that the defendant committed an act that is reckless and wanton disregard of life; and
3. As the result of committing specific crimes: requires that the defendant cause the death of the unborn child in perpetrating or attempting to commit arson, rape or a sex offense,

robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon.

The offenses are classified as Class A felonies, with the punishment being life in prison without parole. The death penalty cannot be imposed under the act.

The act also provides for a voluntary manslaughter charge if a defendant unlawfully causes the death of an unborn child by an act which would be voluntary manslaughter if the pregnant woman died. The offense would be a Class D felony. Voluntary manslaughter is an unlawful killing without "malice." This could be intentional conduct that falls into one of two situations:

1. A "heat of passion" caused by provocation that would cause an ordinary person to be beyond his or her power of control; or
2. A killing resulting from an imperfect right of self-defense (excessive force used).

The proposed legislation provides for an involuntary manslaughter charge if a defendant unlawfully causes the death of an unborn child by an act which would be involuntary manslaughter if the pregnant woman died. The offense would be a Class F felony. Involuntary manslaughter is an unlawful killing of a person in one of three circumstances:

1. By an unlawful act that is not an underlying felony for the purposes of the felony murder rule (DWI with fatality) or is not inherently dangerous to life (a light blow to the head to an unexpectedly vulnerable victim);
2. By engaging in conduct in a reckless and careless manner, showing thoughtless indifference to the rights of others (unsafe use of firearms); or
3. By culpable omission to perform a legal duty (parent failure to care for child who dies of starvation).

In addition, the act provides for the offense of assault inflicting serious bodily injury if the defendant assaults the mother of a child who is [due to the assault] (i) born with serious bodily injuries; (ii) kept hospitalized for a prolonged period; or (iii) born prior to 37 weeks gestation and weighs less than 2,500 grams (5.5 pounds) at birth. The offense is a Class F felony. For the purposes of the statute, "serious bodily harm" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ.

The act provides for the offense of battery on an unborn child if the defendant commits a battery on a pregnant woman. The offense would be Class A1 misdemeanor. This offense would be a lesser included offense of assault inflicting serious bodily injury on an unborn child.

The act does not apply to:

- Legal abortions;
- Usual and customary standards of medical practice during diagnostic testing or therapy; or
- Acts committed by the pregnant women with regard to her unborn child.

Except for the intentional murder offense, a defendant need not have knowledge of the pregnancy, or the specific intent to cause death or serious bodily injury to the unborn child.

DOC Impact: G.S. 14-23.2, Murder of an unborn child; penalties

There were 82 convictions for first degree murder and 230 convictions for second degree murder (Class B2) in FY 2009-10. It is not known whether any of these 312 convictions also involved the death of an unborn child so as to qualify for the new Class A felony in G.S. 14-23.2.

The proposed offense would also apply to conduct which does not currently result in a homicide charge, or in any criminal charge. A felony that would support a charge of felony murder under G.S. 14-17 but which results in the death of an unborn child and no live-born victim would qualify for the additional Class A felony in G.S. 14-23.2. Likewise, an assault on a pregnant woman with the intent to kill the unborn child, resulting in the death of the fetus but not the mother, would qualify for the new Class A felony. A reckless and wanton act inherently dangerous to human or fetal life resulting in the death of an unborn child but in no other harm would also qualify for the Class A felony under G.S. 14-23.2. Given the many scenarios that would sustain a charge, the breadth of conduct covered by the new offense cannot be determined.

Since the proposed section creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this section on the prison population. It is not known how many offenders might be convicted and sentenced under the proposed section. Because all persons convicted of the new Class A felony will serve a life sentence in prison, the offense could have a long-term effect on the prison population due to a “stacking” effect.

G.S. 14-23.3. Voluntary manslaughter of an unborn child; penalty

There were 78 convictions for voluntary manslaughter in FY 2009-10. It is not known whether any of these convictions involved the death of an unborn child so as to qualify for the new Class D felony in G.S. 14-23.3.

The proposed offense would also cover additional acts involving a provoked assault upon, or use of excessive self-defensive force against, a pregnant woman resulting in the death of the unborn child but not the woman. However, it is unknown whether any criminal convictions in FY 2009-10 involved these scenarios.

Since the proposed section creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this section on the prison population. It is not known how many offenders might be convicted and sentenced under the proposed section.

Under Structured Sentencing, with the exception of extraordinary mitigation, all Class D offenders are required to receive an active sentence. In FY 2009-10, the average estimated time served for an offender convicted of a Class D offense was 63 months. If, for example, there was one conviction for this proposed offense per year, this proposed change would result in the need for one additional prison bed the first year and two additional prison beds the second year. In addition, since a period of Post-Release Supervision follows release from prison for offenders convicted of Class B1-E felonies, there will be some impact on Post-Release Supervision caseloads and prison beds due to revocations.

G.S. 14-23.4. Involuntary manslaughter of an unborn child; penalty

There were 68 convictions for Class F involuntary manslaughter in FY 2009-10. It is not known whether any of these convictions involved the death of an unborn child so as to qualify for the new Class F felony in G.S. 14-23.4.

The proposed offense would also cover additional acts involving unlawful, careless or reckless conduct, or a culpable breach of duty, resulting in the death of an unborn child but not the mother. Given the many scenarios that would support such a charge, the breadth of conduct covered by the new offense cannot be determined.

Since the proposed section creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this section on the prison population. It is not known how many offenders might be convicted and sentenced under the proposed section.

In FY 2009-10, 54 percent of Class F convictions resulted in active sentences, with an average estimated time served of 18 months. If, for example, there were two Class F convictions for this proposed offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year.

G.S. 14-23.5. Assault inflicting serious bodily injury on an unborn child; penalty

There were 215 offenses for assault inflicting serious bodily injury in FY 2009-10. It is not known whether any of these offenses involved injuries to unborn children. Likewise, it is unknown whether or how many convictions for other assaultive offenses in FY 2009-10 involved both battery upon a pregnant woman and serious bodily injury to the unborn child subsequently born alive so as to qualify for the new Class F felony under G.S. 14-23.5.

Since the proposed section creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this section on the prison population. It is not known how many offenders might be convicted and sentenced under the proposed section.

In FY 2009-10, 54 percent of Class F convictions resulted in active sentences, with an average estimated time served of 18 months. If, for example, there were two Class F convictions for this proposed offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year.

G.S. 14-23.6. Battery of an unborn child

It is unknown how many convictions for all varieties of misdemeanor and felony assault, assault and battery, affray, and other assaultive offenses in FY 2009-10 involved a battery upon a pregnant victim. Any such offense would qualify for the additional Class A1 misdemeanor in G.S. 14-23.6, insofar as it involved at least one pregnant victim.

Since the proposed section creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this section on the prison population. It is not known how many offenders might be convicted and sentenced under the proposed section.

In FY 2009-10, 32 percent of Class A1 misdemeanor convictions resulted in active sentences. The average estimated time served for Class A1 convictions was 46 days. Offenders serving active sentences of 90 days or less are housed in county jails. Therefore, convictions for this proposed offense would not be expected to have a significant impact on the prison population. The impact on local jail populations is not known.

AOC Impact: New Felony Offenses (G.S. 14-23.1 through 14-23.4)

According to the State Center for Health Statistics, there were 855 fetal deaths in North Carolina (“fetal deaths” excludes therapeutic abortions and pregnancies of less than 20 weeks) in 2009. A 2001 study of “Fetal Deaths Related to Maternal Injury” (Weiss, Songer, and Fabio, in Journal of the American Medical Association, October 17, 2001, Vol. 286, No. 15) using 1995 – 1997 data estimated the following for North Carolina:

	Deaths Due to Injury per 1,000 Fetal Deaths	Deaths Due to Motor Vehicle-related Injury per 1,000 Fetal Deaths
North Carolina	6.9	2.7
National Data	5.4	3.4

In addition, the study found that nationally 11 percent of fetal deaths due to injury were accompanied by maternal deaths, most often due to motor vehicle-related causes. Applying the estimates per 1,000 to the 855 fetal deaths in North Carolina in 2009 yields an estimated average of six fetal deaths due to injury per year (0.069 percent of 855), of which two deaths would be estimated to be motor vehicle-related (0.027 percent of 855).

If all six of the estimated fetal deaths due to injury resulted in charges under the proposed legislation, there would be six additional felony charges in Superior Court, ranging from Class F to Class A. Workload impact would depend on the level of the offense charged, and the nature of any other charges the defendant would face under current law. While additional charges could bring the potential of a longer sentence if run consecutively, and could increase the vigor of the defense and therefore the time involved in processing the case, the increase in workload would not be as great as for new charges involving new defendants.

For example, the estimated cost of the court personnel time to process a homicide case other than first-degree murder is, on average, \$6,600. This estimate includes all disposition types (i.e. trials, pleas, dismissals), and the personnel costs for a superior court judge, court reporter, deputy clerk, assistant district attorney, and other DA office staff. Costs per trial would be much higher. The impact of new lower level felony charges, such as the proposed Class F felony for involuntary manslaughter of an unborn child, would require fewer resources.

G.S. 14-23.5. Assault inflicting serious bodily injury on an unborn child; penalty and G.S. 14-23.6. Battery on an unborn child

According to the State Center for Health Statistics, in 2009 there were 126,785 live births in North Carolina. The Centers for Disease Control and Prevention (CDC) estimates that, in North Carolina, 2.6 percent of women with live births were physically abused by their spouse or partner while pregnant. (Pregnancy Risk Assessment Monitoring System (PRAMS), 2008 data.)

Using this estimate of intimate partner violence, one estimate of activity that could be charged with the new Class A1 misdemeanor of assault on an unborn child would be 3,296 (2.6 percent of 126,785) instances annually. However, based on other domestic violence research, it is likely that only a fraction of these instances would result in the filing of criminal charges. In addition, it is likely that charges under the proposed legislation would be additional charges against defendants already charged with offenses such as Assault on a female (a Class A1 misdemeanor), rather than charges against new defendants. Additional charges would bring the potential of a longer sentence if run consecutively and could increase the vigor of the defense. Therefore, the time involved in processing the case and the increase in workload would not be as great as for new charges involving new defendants.

In terms of workload impact, AOC anticipates substantial impact only in cases in which the offense against the unborn child was either the only offense charged or was the most serious offense charged. That is, AOC anticipates workload increases due to an increase in the most serious charge faced by an offender or due to an expansion of the number of defendants charged. AOC cannot project the number of charges or the relationship between those charges and any charges faced by those defendants under current law.

In FY 2009-10, a typical felony case took approximately 216 days to dispose in Superior Court. A typical misdemeanor case took approximately 91 days to dispose in District Court. Any increase in judicial caseload without accompanying resources could be expected to further delay the disposition of cases.

IDS Impact: The Office of Indigent Defense Services (IDS) was unable to determine the fiscal impact that the proposed legislation will have on their Office, because it will depend greatly on what, if any, charges are actually brought in the future, as well as the manner in which they are resolved. However, IDS believes that the following factors should be considered in determining the fiscal impact of the bill.

G.S. 14-23.2. Murder of an unborn child; penalties

In cases in which the pregnant woman is also murdered, IDS would not expect to see any significant changes in IDS expenditures. In other words, the defendant would already be facing a

capital offense for their conduct against the pregnant woman. In that event, the bill would merely add a second (and probably lesser) charge to the charge the defendant would already be facing. While there may be some modest increase in defense expenditures as a result of the second charge, it is difficult to assign a monetary value.

If the pregnant woman is not also murdered, but there are grounds to bring another charge against the defendant for violence against her, the fiscal impact would depend on the charges brought for the conduct against the pregnant woman. For example, IDS would expect defense costs to change from the average cost for a Class B2 felony (\$1,635 average for a non-trial and a range between \$3,900 and \$11,250 for a trial)¹ to the average cost for a non-death eligible Class A felony (\$3,127.50 average for a non-trial and a range between \$7,650 and \$41,400 for a trial²).

As another example, IDS would expect defense costs to change from the average cost for a Class C felony (\$1,102.50 average for a non-trial and a range between \$825 and \$7,500 for a trial) to the average cost for a non-death eligible Class A felony (\$3,127.50 average for a non-trial and a range between \$7,650 and \$41,400 for a trial).

G.S. 14-23.3. Voluntary manslaughter of an unborn child; penalty

In cases in which there are grounds to charge the defendant with voluntary manslaughter of the pregnant woman, IDS does not expect there to be any significant additional costs. However, in cases in which there previously were no grounds to charge the defendant with a felony of Class D or higher for their conduct against the pregnant woman, IDS would incur additional expenses. For example, IDS would expect defense costs to change from the average cost for a Class F felony (\$765 average for a non-trial and a range between \$975 and \$12,225 for a trial) to the average cost for a Class D felony (\$1,005 average for a non-trial and a range between \$975 and \$12,675 for a trial).

G.S. 14-23.4. Involuntary manslaughter of an unborn child; penalty

In cases in which there are grounds to charge the defendant with the involuntary manslaughter of the pregnant woman as well, IDS does not expect there to be any significant additional costs. IDS would already have to appoint and pay counsel.

G.S. 14-23.5. Assault inflicting serious bodily injury on an unborn child; penalty and G.S. 14-23.6. Battery on an unborn child

IDS does not expect that these provisions would have a significant impact on defense costs. The addition of a Class F felony or Class A1 misdemeanor charge for the impact on the unborn child would likely result in a second charge against a defendant for whom IDS would already be obligated to appoint and pay counsel. While there may be some modest increase in defense expenditures as a result of the second charge, it is difficult to assign a monetary value.

G.S. 14-23.8. Knowledge not required

¹ Average costs per felony class are calculated at \$75 per hour and based on IDS' study, *FY05 Statewide Private Attorney Superior Court Felony Fee Application Average Hours and Frequency Distributions per Case by Felony Class*, available at www.ncids.org.

² The average cost of a non-death eligible Class A felony resolved without a trial, as well as the range in costs for a trial, are based on the study described in footnote 1. The sample size for Class A felonies in that study was very low (only nine cases), so these figures may not be reliable.

By removing any requirement that the defendant have knowledge that the victim was pregnant, this provision will likely expand the potential application of the offenses to more defendants. However, it is not possible to predict how many additional charges will be brought and, thus, the fiscal impact on IDS.

Section 3:

The act repeals the injury to a pregnant women statute.

Impact: Section 3 does not impose a fiscal impact to the State.

Section 4:

The act specifically does not impose criminal liability on an expectant mother who is the victim of domestic violence.

Impact: Section 4 does not impose a fiscal impact to the State.

Section 5:

This section includes the criminal savings clause which states prosecutions under the repealed statute are not abated.

Impact: Section 5 does not impose a fiscal impact to the State.

Section 6:

This section includes the severability clause which states any invalid provisions do not affect other provisions.

Impact: Section 6 does not impose a fiscal impact to the State.

Section 7:

This section clarifies that other crimes that may have similar but not identical elements may be charged, and the defendant may be convicted of those crimes as well.

Impact: Section 7 does not impose a fiscal impact to the State.

SOURCES OF DATA: North Carolina Sentencing and Policy Advisory Commission; Administrative Office of the Courts; Office of Indigent Defense Services

TECHNICAL CONSIDERATIONS: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Sarah Stone

APPROVED BY: Marilyn Chism, Director
Fiscal Research Division

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