

OFFENSE VARIABLE 9: SCORE FETUS AS VICTIM

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House Bill 4500 as reported by committee w/o amendment
Sponsor: Rep. Pamela Hornberger
Committee: Judiciary
Complete to 9-27-17

Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: The bill would require a fetus to be counted as a victim for purposes of scoring Offense Variable 9. Offense variables are used when determining an appropriate criminal sentence for a person convicted of certain crimes.

FISCAL IMPACT: The bill would have an indeterminate fiscal impact on state and local correctional costs, as described in more detail later in the analysis.

THE APPARENT PROBLEM:

When determining an appropriate sentencing range for various crimes, certain offense variables must be scored. For example, any crime classified as being against a person must score Offense Variable 9. Offense Variable 9, or OV 9, requires the scoring of points based on the number of victims placed in danger of physical injury or death, or property loss, with each person so placed counted as a victim. A recent Michigan Court of Appeals opinion held that when scoring OV 9, a fetus could be counted as a *victim* without declaring the fetus to be a *person*. The ruling was in a case in which the defendant pled guilty to feloniously assaulting his pregnant girlfriend. *People v Ambrose*, Mich App, Docket No. 327877 (2016)

Some feel the court's ruling should be codified, meaning that a court would be required to include a fetus or embryo when counting the number of victims affected by certain crimes. Legislation has been offered to do so.

THE CONTENT OF THE BILL:

House Bill 4500 would amend Chapter XVII of the Code of Criminal Procedure, entitled "Sentencing Guidelines". Under Part 4 ("Offense Variables"), Offense Variable 9 is scored based on the number of victims. The points scored range from 0 (fewer than 2 victims who were placed in danger of physical injury or death, or fewer than 4 victims placed in danger of property loss) to 100 points if multiple deaths occurred.

Currently, each person who was placed in danger of physical injury or loss of life or property as a victim must be counted as a victim. The bill would require that for purposes of scoring Offense Variable 9, an embryo or fetus also be counted as a person.

The bill would take effect 90 days after enactment.

MCL 777.39

BACKGROUND INFORMATION:

Michigan uses an indeterminate sentencing scheme for most criminal offenses, meaning that many sentences are expressed as a range of months or years. The maximum sentence that can be imposed for a particular crime is established in statute and the minimum sentence is imposed by the court. In determining an appropriate sentence range, including the minimum sentence, the judge looks at and scores a number of factors such as whether the offender has a record of prior convictions. Depending on which crime group a conviction falls in, certain elements of the crime, known as "offense variables," for example, whether a gun was used or a victim was injured or killed, must also be scored. There are 6 crimes groups: crimes against a person, property, the public order, the public safety, the public trust and crimes involving controlled substances. A single crime may require scoring more than one offense variable.

In some cases, increasing the points that may be scored for a particular offense variable may affect whether the person would be eligible for community-based sanctions, such as jail and/or probation, or sent to prison. It also could affect a person's earliest parole date if the addition of the increased points to a particular offense variable results in a longer minimum sentence. While the sentence range is no longer mandatory, it is used to provide guidance in determining a sentence appropriate to the facts of the crime; a judge has discretion to go above or below the sentencing range. However, the sentence may be reviewed for reasonableness.

FISCAL INFORMATION:

As a result of changing how victims would be counted under Offense Variable 9, the bill could result in offenders scoring a higher number of points, affecting where they fall on the sentencing grid. Scoring a higher number of points could mean a change in an offender's sentence from community placement to placement in a state correctional facility, or it could mean longer prison sentences as the minimum/maximum ranges would be increased (not to exceed the maximum term established in statute). Given this, the bill could increase costs related to state prisons, county jails, and/or state probation supervisions. In FY 2016, the average cost of prison incarceration in a state facility was roughly \$36,000 per prisoner per year, a figure that includes various fixed administrative and operational costs. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. In FY 2016, state costs for parole and felony probation supervisions averaged about \$3,500 per supervised offender per year.

ARGUMENTS:

For:

Michigan law protects pregnant women by providing harsher penalties for intentional assaultive acts against them. In doing so, the state holds a person accountable for actions that lead to physical injury or death of the unborn child. Some see House Bill 4500 as an

extension of the protection as not all criminal conduct actually injures or results in the death of an embryo or fetus. For a wide range of crimes that require a court to count the number of victims who were placed in danger of physical injury or death or property loss under Offense Variable 9, the bill would require a court to include a fetus or embryo if the fetus or embryo had also been placed in danger of physical injury or death or property loss. Essentially, the bill would codify (place in statute) the 2016 Michigan Court of Appeals decision in *People v Ambrose*.

In that case, the trial court ruled that when scoring the offense variables to determine an appropriate sentencing range for a defendant who held his pregnant girlfriend under water in a ditch, it was appropriate to count the fetus as a victims when scoring Offense Variable 9. The addition of the 10 extra points increased the defendant's sentencing guidelines range from 12 to 24 months imprisonment to 14 to 29 months imprisonment. In coming to its decision, the Court of Appeals concluded that the OV 9 statute allowed a trial court to count "one that is acted one" and placed in danger of physical injury or loss of life or loss of property by a defendant's conduct as a victim and also that the statute did not provide a definition of "victim" that limited inclusion of a fetus or embryo. To support that conclusion, the *Ambrose* court relied on the law that provides harsher penalties for assaults against pregnant women. By enacting that law, the court stated the Legislature indicated that a fetus could be placed at risk of loss of life or bodily injury. Thus, the Court of Appeals upheld the trial court's ruling that a fetus or embryo could be counted as a victim when scoring OV 9.

Though the *Ambrose* ruling must be followed by all trial courts in Michigan, some feel the decision should also be placed in statute. By doing so, it is believed that the judges and lawyers will implement the appellate ruling accordingly. Even though counting a fetus or embryo as a victim when scoring OV 9 may lengthen a defendant's minimum and maximum sentence range (up to the maximum term of imprisonment set in statute), a judge would still have discretion to depart from that range—as long as the departure was reasonable.

Against:

The bill is not needed now that there is case law establishing that a fetus may be counted as a person when determining the number of victims for the purpose of scoring Offense Variable 9. Moreover, the case law embodies the state Supreme Court ruling in *People v Lockridge* (2015) that sentencing guidelines are advisory in nature by allowing, rather than requiring as the bill would do, that a court count a fetus. In that sense, the bill would not mirror the Court of Appeals decision in *Ambrose*.

Further, 5 out of the 6 crime groups require OV 9 to be scored. Thus it could be more far-reaching than implied. Since the courts, in determining a sentence range, would have to consider OV 9 for almost all crimes committed, the bill could have the potential to increase many minimum sentences. The result could be more persons being sent to prison rather than probations and/or jail should the victim of the crime be pregnant and the embryo or fetus determined to have been placed in danger of physical injury or loss of life or property.

This would be true even if the offender did not know the person was pregnant or intended to harm the fetus or embryo.

Against:

As laws protecting the rights of fetuses and embryos have been codified in other states, a trend to convict pregnant women of various crimes is also increasing. For instance, women have been charged with feticide and jailed for such things as miscarrying and attempting to commit suicide. It is acknowledged that the bill would affect the sentencing guidelines and not create a new crime category. Nonetheless, these stories highlight the slippery slope towards unintended consequences when the rights of embryos and fetuses are placed into statute. Concern has been raised that the bill could allow Michigan courts to treat a pregnant woman convicted of a broad range of crimes more harshly if her conduct was deemed to have placed her unborn child in physical danger or danger of property loss, and therefore by counting the embryo or fetus as a victim, she received a longer sentence. The concern that the bill is just another example of attempts to chip away a woman's constitutionally protected right to have an abortion was also expressed.

POSITIONS:

A representative of Right to Life of Michigan testified in support of the bill. (9-12-17)

The Michigan Catholic Conference indicated support for the bill. (9-12-17)

A representative of ACLU of Michigan testified in opposition of the bill. (9-12-17)

Planned Parenthood Advocates of Michigan indicated opposition to the bill. (9-12-17)

The American Association of University Women indicated opposition to the bill. (9-12-17)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.