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.)

BILL: CS/SB 688

SPONSOR: Criminal Justice Committee and Senator Campbell

SUBJECT: DUI/ Refusal to Test for Alcohol or Drugs

DATE: April 22, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Favorable/CS
2.			FP	
3.				
4.				
5.				

I. Summary:

The CS/SB 688 creates a new section in the DUI statute which provides that it is a first degree misdemeanor for a person to refuse to submit to a chemical or physical test of his or her breath, blood, or urine, upon the request of a law enforcement officer who has probable cause to believe such person was driving or was in actual physical control of a vehicle while under the influence of alcohol or drugs (DUI). Thus, persons refusing to submit to a test for alcohol or drugs would not only be subject to license suspension, they would also be subject to first degree misdemeanor penalties under the CS (up to a year in jail and/or a fine not exceeding $1,000).

The CS also provides that the disposition of any administrative proceeding relating to the suspension of a person's driving privilege does not affect a criminal action under the new section, nor does the disposition of a criminal proceeding under the new section affect any administrative proceeding relating to the suspension of a person's driving privilege.

This CS creates s. 316.1939 and amends sections 316.1932 and 316.1933 of the Florida Statutes.

II. Present Situation:

Section 316.193, F.S.(Supp. 1998), proscribes driving under the influence of alcohol or drugs to the extent normal faculties are impaired or driving with a blood alcohol level (BAL) of .08 percent or higher (DUI). Penalties for DUI vary according to the frequency of previous convictions, the offender's BAL when arrested, and whether serious injury or death results.

Section 316.1932, F.S.(Supp. 1998), commonly referred to as the implied consent statute, provides that any person who operates a motor vehicle in Florida is deemed to have consented to submit to an approved chemical test or physical test for the purpose of determining the alcoholic content of his blood or breath and to a urine test for the purpose of detecting the presence of drugs. Such tests may only be administered incidental to a lawful arrest based upon reasonable cause to believe the person is driving under the influence.

Refusal to submit to a required test will result in the suspension of a person's driver's license as follows: one year for the first refusal and 18 months for a second or subsequent refusal. In addition, refusal to submit to testing is admissible into evidence in any criminal proceeding. s. 316.1932 (1)(a), F.S. (Supp. 1998).

Florida courts have found that s. 316.1932, F.S., does not give persons the **right** to refuse to submit to testing, but rather it gives them the **option** to refuse to submit to testing. *State v. Young*, 483 So.2d 31, 33 (5th DCA 1985) [pointing out the Florida Supreme Court's discussion on the "right to refuse testing" in *Sambrine v. State*, 386 So.2d 546 (Fla. 1980)], and *State v. Hoch*, 500 So.2d 597 (3rd DCA 1986) [citing the United States Supreme Court in *South Dakota v. Neville*, 459 U.S. 553, 565 (1983), in which the Court found that the driver's right to refuse the blood-alcohol test was "simply a matter of grace bestowed by the South Dakota legislature."] The *Hoch* court reasoned that since the driver has no constitutional right to refuse to be tested, only the option to refuse, the implied consent statute does not provide the driver with a pre-breath test right-to-counsel under the Sixth or Fifth Amendment. *Id.* at 599.

The implied consent statute also provides that a person consents to an approved blood test to determine the alcoholic content of blood or the presence of drugs when the person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test is impractical or impossible. s. 316.1932(1)(c), F.S. (Supp. 1998).

The implied consent statute has been upheld against a Fifth Amendment challenge in *State v. Pagach*, 442 So. 2d 331 (2nd DCA 1983). In upholding the constitutionality of the statute, the Second District Court of Appeal followed the United States Supreme Court's holding in *Neville*. In that case, the Court concluded that "a refusal to take a blood alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." Id. at 564. The Supreme Court went on to hold that the admission of the refusal into evidence at the criminal trial does not violate due process, even though the driver was not fully warned of the consequences of refusal. *Id.*

The Second District Court of Appeal in *Freeman v. State*, 611 So.2d 1260 (2nd DCA 1992), has also upheld the implied consent statute as constitutional against a double jeopardy challenge by finding that the purpose of the statute providing for revocation of a driver's license upon a conviction for DUI is to provide an administrative remedy for public protection and not to punish the offender. *Id*. at 1261. The Fifth District Court of Appeal also reached the same conclusion in *Davidson v. MacKinnon*, 656 So.2d 223 (5th DCA 1995) (holding that license suspension serves the primary purpose of enhancing safe driving on public highways and thus does not prohibit subsequent criminal prosecution for DUI.) *Id.*

Section 316.1933, F.S. (Supp. 1998), authorizes mandatory blood tests when a law enforcement officer has probable cause to believe a vehicle driven by a person who is under the influence of alcohol or drugs has caused the death or serious bodily injury of a human being. The officer may use reasonable force if necessary to require the driver to submit to a blood test.

III. Effect of Proposed Changes:

The CS/SB 688 would create a new section in the DUI statute, s. 316.1939, F.S., which would provide that it is a first degree misdemeanor for a person to refuse to submit to a chemical or physical test of his or her breath, blood, or urine. The elements that would have to be established before a person could be convicted of refusing to take a test for DUI are as follows:

- the law enforcement officer had probable cause to believe the person was driving under the influence;
- the person was placed under lawful arrest;
- the person was informed, prior to making the decision to take the test or not, that refusal to submit to testing would subject such person to license suspension and to misdemeanor penalties; and
- after having been so informed, the person refused to submit to testing when requested to do so by law enforcement.

Thus, under the CS, persons refusing to submit to a test for alcohol or drugs would not only be subject to license suspension, they would also be subject to first degree misdemeanor penalties under the CS (up to a year in jail and/or a fine not exceeding $1,000).

The CS would also provide that the disposition of any administrative proceeding relating to the suspension of a person's driving privilege would not affect a criminal action under the new section, nor would the disposition of a criminal proceeding under the new section affect any administrative proceeding relating to the suspension of a person's driving privilege.

Finally, CS/SB 688 would make conforming changes in s. 316.1932, F.S., to require that a person be informed that failure to submit to a lawful test for detecting the presence of alcohol or drugs upon a law enforcement officer's request would be punishable as a first degree misdemeanor. Another conforming change would be made in s. 316.1933, F.S., to delete the reference to a person's ability to refuse to submit to testing.

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:

Several other states have enacted laws similar to the one proposed by CS/SB 688 which would provide for criminal penalties for refusing to submit to chemical testing for DUI. These states include Alaska, Minnesota, Nebraska, New York, and California. Alaska, Minnesota, and Nebraska all penalize the failure to submit to chemical testing by making it a crime. California provides "enhanced penalties" for refusal to test, if the person is convicted of DUI. New York, on the other hand, criminalizes the refusal to take a *preliminary* breath test, but does not criminally punish the refusal to submit to a post-arrest breath test.

These state statutes have come under attack on various constitutional grounds, including violations of the Fifth Amendment right against self-incrimination, the Fourth Amendment right against unreasonable search and seizure, the Sixth Amendment right to counsel, the Equal Protection Clause, the Due Process Clause, and the Double Jeopardy Clause.

The Nebraska Supreme Court in *State v. Green,* 229 Neb. 493, 427 N.W. 2d 304 (Neb. 1988) stated that driving is not a fundamental right, but a privilege granted by the State. The Court went on to hold that "evidence obtained from a driver by testing body fluids in the implied consent context in not testimonial or communicative in nature and does not fall within the constitutional right against self-incrimination." *Id.* at 496. The Court thus upheld the criminal refusal statute against a Fifth Amendment challenge.

The Nebraska Supreme Court also held that there is no double jeopardy violation when a defendant is convicted of DUI after being convicted earlier for refusal to submit to a chemical test because these statutes create separate and distinct offenses, each requiring proof of an element that is unique to each offense. *State v. Stabler,* 209 Neb. 298, 306 N.W. 2d 925 (Neb. 1981).

The First District Court of Appeal in California has also upheld its statute providing enhanced criminal penalties for refusal to test after being convicted for DUI against a double jeopardy challenge in *Ellis v. Pierce,* 230 Cal.App.3d 1557, 282 Cal. Rptr. 93 (Cal.Ct. App. 1991). This statute was also found not to violate the privilege against self-incrimination nor was it violative of substantive due process. *Quintana v. Municipal Court for San Leandro-Hayward Judicial District of Alameda County,* 192 Cal.App.3d. 361, 237 Cal. Rptr. 397 (Cal.Ct. App. 1987).

Similarly, the Court of Appeals of Alaska held there was no double jeopardy violation for revoking a defendant's driver's license for refusing to submit to testing or for having test results indicate an unlawful blood alcohol level and later prosecuting the defendant for the crime of DUI or the crime of refusal to submit to testing. *State v. Zerkel*, 900 P.2d 744 (Alaska App. 1995). The court concluded that administrative license revocation is a "remedial" sanction (removing unsafe drivers from the road) not a "punitive" sanction for federal double jeopardy purposes. Thus, the court held that license revocation does not impede the subsequent prosecution for DUI. *Id.* at 758.

The Court of Appeals of Alaska has also held that the law criminalizing refusal to submit to chemical testing is rationally related to preventing drunk driving and as such, does not violate

substantive due process. The statute also does not violate the prohibition against cruel and unusual punishment under *Jensen v. State*, 667 P.2d 188 (Alaska App. 1983). The court concluded that the legislature could reasonably decide that breath exams are helpful in identifying and successfully prosecuting drunk drivers and that a refusal to test is an impediment to those goals. "Since a defendant has no right to refuse such an examination, citing *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), penalizing a refusal serves the legitimate legislative goals of deterring such refusals and ensuring that those who refuse gain no benefit by their refusal."*Id.* at 190.

Furthermore, the United States Court of Appeals for the Ninth Circuit in *Deering v. Brown*, 839 F.2d 539 (9th Cir.1988) held that the admission of a defendant's refusal to submit to a breath test under Alaska's criminal refusal statute did not violate the Fifth Amendment, even though the state made refusal a separate crime. *Id*. The Ninth Circuit Court of Appeals noted in *Deering* that two lower courts in New York reached different results when considering a similar challenge to their statute criminalizing a preliminary breath test. Compare *People v. Hamza*, 109 Misc.2d 1055, 441 N.Y.S.2d 579, 581 (Gates Town Ct. 1981) (imposition of criminal rather than civil penalties for refusal makes the statute unconstitutional), and *People v. Brockum*, 88 A.D.2d 697, 451 N.Y.S.2d 326, 327 (N.Y.App.Div. 1982) (statute does not violate the fifth amendment because the taking of a breath test does not involve testimonial compulsion).

In addition, the United States District Court for Alaska in *Burnett v. Municipality of Anchorage*, 634 F. Supp. 1029 (D. Alaska 1986) held that Alaska's imposition of criminal penalties on a driver for refusal to submit to breath testing does not violate the right of equal protection nor does it violate a driver's Fourth Amendment rights. *Id.*

Another court looking at its statute criminalizing the refusal to submit to testing and holding that criminal prosecution for refusal in certain instances did not violate the privilege against compelled self-incrimination was the Minnesota Supreme Court in *McDonnell v. Commissioner of Public Safety*, 473 N.W.2d 848 (Minn. 1991). The Court did hold, however, that under its state constitution, the statute violated due process and the defendant's Sixth Amendment right to counsel. *Id.*

If CS/SB 688 is enacted, whether the Florida courts will be persuaded to follow the previously cited cases upholding the constitutionality of their statutes or whether they will distinguish the newly enacted statute and find it violates one of these enumerated constitutional rights on federal or state grounds is ultimately a question that the appellate courts in Florida will have to resolve.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons refusing to submit to a chemical test for alcohol or drugs would not only be subject to license suspension, they would also be subject to first degree misdemeanor penalties under the CS (up to a year in jail and/or a fine not exceeding $1,000).

C. Government Sector Impact:

There could be an indeterminable fiscal impact upon local jails around the state to the extent that judges sentence persons who refuse to submit to chemical testing for DUI to incarceration in the county jails (up to one year) under CS/SB 688.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.