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: SB 2762

SPONSOR: Senator Smith

SUBJECT: Driving Under the Influence

DATE: April 7, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Lang	JU	Favorable
2.			CJ	
3.				
4.				
5.				
6.				

I. Summary:

This bill authorizes records from the Department of Highway Safety and Motor Vehicles relating to prior convictions for driving under the influence to be admitted as evidence to establish previous convictions. This bill provides that this evidence may be contradicted or rebutted.

This bill substantially amends section 316.193 of the Florida Statutes.

II. Present Situation:

Admission of Hearsay Statements into Evidence

Both the Federal and the Florida Rules of Evidence address admissibility of hearsay evidence. Hearsay, or out of court statements made by someone other than the declarant are generally inadmissible, unless they are considered to be non-hearsay, or to come under a firmly rooted exception to the hearsay rule. The United States Supreme Court has recognized certain types of hearsay as firmly rooted exceptions to include dying declarations, cross-examined trial testimony, business records, public records, co-conspirator statements, spontaneous statements, and statements made for the purpose of obtaining medical diagnosis or treatment.[1] The hearsay statement must be inherently reliable, such as that the circumstances surrounding it or its content demonstrate it to be sufficiently reliable that adversarial testing is unnecessary.[2] This showing is independent of other corroborating evidence, which, although it bolsters the statement does nothing to address that the statement was reliably given.[3]

---

[1] *See Mattox v. United States*, 156 U.S. 237, 243 (1895); *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *United States v. Inadi*, 475 U.S. 387, 394 (1986); *White v. Illinois*, 502 U.S. 346, 355 (1992).

[2] Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 House. L. Rev. 1003, 1057-1058 (2003).

[3] *See Idaho v. Wright*, 497 U.S. 805, 820-821 (1990).

The Florida Rules of Evidence provide for certain hearsay exceptions for which the availability of the declarant is immaterial, such as public records and reports.[4] This section provides in part, for admissibility of:

> Records, reports, statements reduced to writing, or data compilations, in any form of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report…unless the sources of information or other circumstances show their lack of trustworthiness.[5]

However, such reports still must comport with authenticity. Section 90.901, F.S. provides:

> Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Authenticity is typically proven through production of a document containing an official seal, a signature by the custodian attesting to its authenticity or by an officer or employee of any official entity, a copy of an official public record, and a report or entry of a document authorized by law to be recorded or filed, and recorded or filed in a public office.[6] The Florida Rules of Evidence expressly authorize the admission of copies of public records, provided that they meet the authenticity threshold.[7] Also, copies of official public records, authenticated, meet the Best Evidence Rule, as required under s. 955.1, F.S.

Electronic recordkeeping system records are admissible if they meet the same requirements as any other type of document kept as a public record.[8]

Presumptions and Inferences

Presumptions carry greater weight than inferences. As the Eleventh Circuit Court of Appeals expressed:

> A presumption is an evidentiary device that enables the trier-of-fact to presume the existence of an element of the crime from a basic fact already proven beyond a reasonable doubt. The vast majority of presumptions are given to the jury during the instructions on the law at the close of the evidence.[9]

The United States Supreme Court stated:

> Inferences and presumptions are a staple of our adversary system of fact-finding. It is often necessary for the trier of fact to determine the existence of an element of the crime--

[4] s. 90.803 (8), F.S.
[5] s. 90.803 (8), F.S.
[6] s. 90.803 (1), (2), and (4), F.S.
[7] s. 90.955 (1), F.S.
[8] Charles W. Ehrhardt, Florida Evidence, vol. 1, pg. 951 (2003).
[9] *Santiago Defuentes v. Dugger*, 923 F.2d 801, 804 (11th Cir.1991)

> that is, an 'ultimate' or 'elemental' fact--from the existence of one or more 'evidentiary' or 'basic' facts.[10]

Rebuttable presumptions (or permissive inferences) are permissible in criminal cases whereas mandatory presumptions are generally not allowed. The Florida Supreme Court has interpreted Article 1, Section 9 of the Florida Constitution as prohibiting mandatory, irrebutable presumptions in criminal cases:

> Mandatory presumptions violate the Due Process Clause if they relieve the state of the burden of persuasion on an element of an offense.[11]

A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts.[12] In contrast, a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.[13] The policy behind this distinction is explained by the court in *Tatum v. State* as follows:

> Because it is the prosecution's burden to prove beyond a reasonable doubt every element of a charged offense, presumptions may not be utilized in the same way against a defendant in a criminal case as might be against a defendant in a civil case.[14]

Additionally, a presumption or an inference may raise a due process challenge based on self-incrimination. Critical to a court's analysis in determining that a presumption or an inference is constitutional in a criminal case is whether a defendant must testify to rebut the presumption. In 1980, the Florida Supreme Court ruled that if a defendant can attempt to explain an inference regarding the possession of stolen goods by evidence other than his or her own testimony, the defendant is not compelled to testify.[15]

Admissibility of Department of Highway Safety and Motor Vehicles Records

For driving under the influence cases, the state is generally required to submit certified copies of each prior judgment to prove prior DUI convictions.[16] In a case heard by the Fifth District Court of Appeal, the court admitted Department of Highway Safety and Motor Vehicles records to prove license revocation, where the intent of the defendant was at issue regarding habitual offender status.[17] However, for a felony driving under the influence charge, the Third District Court of Appeal ruled that a computerized driving record was too unreliable to meet the elements of the crime as the state burden in a criminal case was to prove beyond a reasonable doubt that the defendant had at lease three prior DUI convictions, and that the defendant was the actual person convicted.[18] Similarly, the Fourth District Court of Appeal precluded admission of

---

[10] *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
[11] *State v. Brake*, 796 So.2d 522, 529 (Fla. 2001).
[12] *See Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)
[13] *See Francis* at 314.
[14] 857 So.2d 331, 336-337 (Fla. 2d DCA 2003).
[15] *See Edwards v. State*, 381 So.2d 696, 697 (Fla. 1980)
[16] *See State v. Harbaugh*, 754 So.2d 691, 694 (Fla. 2000).
[17] *See Arthur v. State*, 818 So.2d 589, 592 (Fla. 5th DCA 2002).
[18] *See State v. Pelicane*, 729 So.2d 534, 535 (Fla. 3d DCA 1999).

department records to show defendant's prior convictions to establish a felony charge of driving while license suspended, particularly in the absence of corroborating reliable evidence.[19]

III. Effect of Proposed Changes:

This bill authorizes records from the Department of Highway Safety and Motor Vehicles relating to prior convictions for driving under the influence to be admitted as evidence to establish previous convictions. This bill provides that this evidence may be contradicted or rebutted. This bill clarifies that other evidence may be presented as well to establish prior convictions.

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:

As this bill provides for contradiction or rebuttal, it does not appear that a court would construe admission of these records as indicative of a mandatory presumption, and it would likely survive a constitutional challenge on this basis.

However, it may be difficult for a defendant to disprove such a conviction without taking the stand. Therefore, a court may find that a defendant's rights against self-incrimination are violated.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

[19] *See Williams v. State*, 865 So.2d 5, 6 (2004).

VI. Technical Deficiencies:

None.

VII. Related Issues:

As the reason for admission of department records is not to show notice on the part of the defendant, but that the convictions actually occurred. A court may find that they do not rise to the level of reliability as do certified copies of judgments, and are therefore insufficient substitutes for proving convictions.

VIII. Amendments:

None.