HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 317 Blood Testing of Persons Involved in a Traffic Accident Causing Serious Injury or Death

SPONSOR(S): Kravitz

TIED BILLS: **IDEN./SIM. BILLS:** SB 804

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Infrastructure	6 Y, 2 N	Brown	Miller
2) Economic Expansion & Infrastructure Council			
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

HB 317 provides that if a law enforcement officer has reasonable suspicion that a person was driving or in actual physical control of a motor vehicle when it was involved in an accident that may have caused or contributed to the death or serious bodily injury of a human being, the officer must require the person to submit to a blood test for the purpose of determining the person's blood alcohol content or identifying the presence of chemical substances.

The bill further provides that the result of this blood test is admissible at trial, if the court reviews all evidence collected before, during, or after the test, and concludes that there was probable cause to believe that the person was under the influence.

The bill takes effect July 1, 2008.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government. This bill would require a person reasonably suspected of driving or in actual physical control of a vehicle involved in an accident in which death or serious bodily injury occurs to submit to a blood test regardless of whether the officer has probable cause, at the time of the test, to believe that the person was under the influence or alcohol or other substances. The results of the test would be admissible at trial only if the court, after reviewing all of the evidence collected prior to, during, or after the test, is satisfied that probable cause exists, independent of the result of the test, to believe that the person was under the influence.

B. EFFECT OF PROPOSED CHANGES:

Current law – Implied Consent

Section 316.1932, F.S., sets forth what is commonly known as the implied consent law. It provides in part:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages.[1]

A breath or urine test must be incidental to a lawful arrest at the request of a law enforcement officer who has reasonable cause to believe the offender was driving under the influence.

A blood test, rather than a breath or urine test, is possible under certain additional conditions. A person is deemed to have consented to a blood test (even if the person has not yet been arrested), if:

- There is reasonable cause to believe the person was driving under the influence,
- If the person appears for treatment at a medical facility (including an ambulance), and
- if the administration of a breath or urine test if impractical or impossible.[2]

As with breath or urine tests, the law enforcement officer must have reasonable cause to believe the person was under the influence *before* the test is performed.

Current law – Blood test for impairment in cases of death or serious bodily injury

Section 316.1933, F.S., requires a person to submit to a blood test when a law enforcement officer has probable cause to believe the person was driving under the influence and caused death or serious

[1] Section 316.1932(1)(a)1, F.S. The next sub-subparagraph provides that drivers are also deemed to have consented to a *urine* test for the purpose of detecting the presence of a chemical substance or controlled substance.
[2] Section 316.1932(1)(c), F.S.

bodily injury.[3] The law enforcement officer may use reasonable force if necessary to require the person to submit to the blood test. The testing does not need to be incidental to a lawful arrest of a person. The blood must be withdrawn by a medical professional or technician.[4]

Current Case Law – Fourth Amendment; Probable Cause; 'Special Needs'

The Fourth Amendment of the United States Constitution protects the people of the United States from "unreasonable search and seizure," and requires that specific warrants may be issued, but only upon "probable cause."

There appears to be little controversy over the fact that a blood draw is a "search" pursuant to the Fourth Amendment. The Florida courts have noted, "the Fourth Amendment does not prohibit all searches, only unreasonable ones."[5] For example, in the blood draw statute discussed above, the law enforcement officer must have probable cause to believe the person was driving under the influence before performing a blood test.

Current Florida law allows blood tests to be taken with less than probable cause, but only in a limited number of circumstances where the state's interest is extraordinarily high, allowing the Fourth Amendment requirement of probable cause to be set aside. These circumstances are sometimes referred to as "special needs" exemptions.

For example, the 5th DCA has addressed the taking of blood samples without consent from convicted prisoners.[6] In *Smalley v. State*, 889 So.2d 100 (2004), the Court cited *Skinner v. Railway Labor Executive's Ass'n*, 489 U.S. 602 (1989) for its proposition that blood samples constitute a "search," under the U.S. Constitution, and that the 'special needs' exception is valid. The court quoted the following passage from another federal case, *Green v. Berge*, 354 F.3d 675 (7th Cir.2004):

> [S]pecial needs searches adopt a balancing of interests approach. Special needs searches have been held to include drug testing.... In determining the reasonableness of these searches the Supreme Court has considered the governmental interest involved, the nature of the intrusion, the privacy expectations of the object of the search and, to some extent, the manner in which the search is carried out.... Although the state's DNA testing of inmates is ultimately for a law enforcement goal, it seems to fit within the special needs analysis the Court has developed for drug testing and searches of probationers' homes, since it is not undertaken for the investigation of a specific crime.

[3] Section 316.1933(1)(b), F.S. defines serious bodily injury as an injury "to any person, including the driver, which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

[4] Section 316.1933(2)(a), F.S. provides that "[o]nly a physician, certified paramedic, registered nurse, licensed practical nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician acting at the request of a law enforcement office may withdraw blood for the purpose of determining the alcoholic content thereof or the presence of chemical substances or controlled substances therein."

[5] *Fosman v. State*, 664 So.2d 1163 (4th DCA 1995), citing *Skinner v. Railway Labor Executive's Ass'n*, 489 U.S. 602 (1989).

[6] Section 943.325, F.S. requires many categories of convicted persons in Florida, whether incarcerated or otherwise in state custody or control, to submit blood samples for DNA testing and other purposes.

The Florida court pointed out that "other state courts have approved a DNA collection statute similar to Florida's, on the ground it serves an important state interest ('special needs doctrine'), and because inmates subject to the testing are in custody, and are already 'seized.'"[7] The court also noted that

> [p]ersons convicted of crimes, or ones who have been arrested on probable cause, lose many rights to personal privacy under the 4th Amendment… a convicted person has no reasonable expectation of privacy with respect to blood samples for DNA testing which outweighs the state's interest in identifying convicted felons in a manner that cannot be circumvented, in apprehending criminals, in preventing recidivism and in absolving innocent persons charged with crimes. "[8]

The *Smalley* decision affirms the fact that Florida courts recognize the "special needs" doctrine as laid out in federal case law – a doctrine that can be used to set aside the otherwise necessary requirement that an officer have probable cause before searching a person. However, in *Smalley* the persons being searched have actually been convicted of some crime and are incarcerated or supervised by the State.

In *Fosman v. State,* 664 So.2d 1163 (1995), the 4th DCA cited the "special needs" permissions of *Skinner* in discussing the constitutionality of section 960.003, F.S. This law requires an HIV test for anyone charged with crimes involving transmission of bodily fluids. The results of the test are disclosed only to victim and to public health authorities. The Court agreed that the health aspects of the law rose to the level of a compelling state interest and that the defendant could be forced to give a blood sample without a specific finding of, or hearing to determine, probable cause. The court succinctly stated "…the whole point of *Skinner*… is that 'special needs' can outweigh the necessity of probable cause."[9]

Proposed Changes

The proposed legislation inserts a new paragraph into section 316.1933, F.S., allowing a law enforcement officer to draw blood from a person, if the officer has "reasonable suspicion that [the] person was driving… a motor vehicle when it was involved in an accident" that causes death or serious bodily injury. The search does not need to be incident to a lawful arrest, and the law enforcement officer does not need to have, at the time of the search, probable cause to believe the person is under the influence, merely a reasonable suspicion that the person was in control of the vehicle.

The bill also provides that the results of the blood draw will be admissible in court "if the court, after reviewing all of the evidence, whether gathered prior to, during, or after the test, is satisfied that probable cause exists, independent of the test result, to believe that the person… was under the influence."

C. SECTION DIRECTORY:

Section 1. Amends s. 316.1933, F.S.; providing that a law enforcement officer who has a reasonable suspicion that a person driving a motor vehicle when it was involved in an accident that may have caused death or serious bodily injury may require that person to submit to a blood test to determine alcoholic content of the blood; providing that the result of this blood test is admissible at trial, if the court

[7] *Smalley v. State*, 889 So.2d 100 (2004), at 105. Internal citation omitted.

[8] *Id.*

[9] *Fosman v. State*, 664 So.2d 1163 (1995), 1165.

reviews all evidence collected before, during, or after test, and concludes that there was probable cause to believe that the person was under the influence.

Sections 2-5. Reenact ss. 316.066(7), 316.1934(2), 322.2616(18) and 322.27(1)(a), F.S. for the purpose of incorporating the amendment made by this act to section 316.1933, F.S. by reference.

Section 6. Provides effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
   None.

2. Expenditures:

   See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

Because the bill requires a blood draw for persons who may not otherwise require any medical attention, there will presumably be a fiscal impact on local government, although it is unclear whether (or under what circumstances) the cost of the blood draw could be borne by any of the following entities: local law enforcement, a county health provider, a private health provider, or an insurer of the person being tested.

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III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

In *Schmerber v. California*, 86 S.Ct. 1826 (1966), the United States Supreme Court held that it is not an unreasonable search under the Fourth Amendment for police to obtain a warrantless involuntary blood sample from a defendant who is under arrest for DUI if there is probable cause to arrest the defendant for that offense, and the blood is extracted in a reasonable manner by medical personnel pursuant to medically approved procedures. As discussed in the "Current Law" section of this analysis, Florida has a statute to provide for exactly this type of search.

This bill modifies the requirement that the officer have probable cause to believe the person was under the influence, and allows a finding of probable cause to be made in the future, based on all evidence collected before, during, and even after the blood test occurs. A court is permitted to review all collected evidence and decide, independent of the results of the blood test, whether or not the officer could have found probable cause to believe the person was under the influence.

In *Cooper v. Georgia*, 587 S.E.2d 605 (Ga. 2003), the Georgia Supreme Court struck down a statute authorizing a blood test to be taken when the officer had reason to believe to that a person was involved in a traffic accident resulting in serious injuries or fatalities. That statute did not contain the additional language regarding admissibility at trial or after-the-fact finding of probable cause. The Court concluded that the statutory provision was unconstitutional because it authorized a search without probable cause to believe the person was impaired. The Georgia court notes:

> The high courts of several other states have grappled with the constitutionality of provisions allowing the chemical testing of bodily substances without probable cause or valid consent, and based solely on serious traffic mishap. These courts have uniformly rejected provisions which obviate the finding of probable cause. See *McDuff v. State*, 763 So.2d 850 (Miss.2000); *Blank v. State*, 3 P.3d 359 (Alaska 2000); *King v. Ryan*, 153 Ill.2d 449, 180 Ill.Dec. 260, 607 N.E.2d 154 (1992); *Commonwealth v. Kohl*, 532 Pa. 152, 615 A.2d 308 (Pa.1992). Compare *State v. Roche*, 681 A.2d 472 (Maine 1996).[10]

In footnotes to the passage above (omitted here for clarity), the court quotes each decision's refusal to uphold a law that sets aside a requirement of probable cause. The Court also notes the contrary case, Maine's *State v. Roche*, and additional Maine language allowing judicial findings of probable cause after reviewing all gathered evidence from before, during, and after the test was performed. It is this unique language that appears in HB 317.

The Maine statute has been amended (prior to 2004 it provided for breath tests but not blood tests), and has subsequently been upheld in another case. In *State of Maine v. Richard Cormier*, 928 A.2d 753 (2007), the Court explains that the Maine Legislature recognized "the need for more complete information about the involvement of alcohol in serious and fatal accidents," and that blood tests for all drivers involved in fatal crashes "add to the State's body of knowledge regarding the effects of driving in Maine while under the influence of alcohol or drugs and allows the Legislature to be more informed as it shapes policy." The Court notes that the blood testing is performed without regard to whether the operator will be prosecuted for any crime.

As the Court explains:

[10] *Cooper v. Georgia*, 587 S.E.2d 605 (Ga. 2003), 609-610.

> [T]he statute goes on to limit the admissibility of the blood test results at a criminal trial to circumstances in which evidence from the test would demonstrate probable cause to believe the operator was under the influence of intoxicants…. Unique to this statute is the Legislature's authorization of law enforcement to determine whether probable cause existed at the time of the test through evidence gathered *after* the test had been taken.[11]

Analyzing a combination of the "special needs" doctrine, the concept of inevitable discovery[12] and the "evanescent nature of the evidence" involved, the Maine Supreme Court declared that probable cause may be set aside at the time of a blood draw under the Maine statute. "If the State presents evidence gathered after the fact demonstrating that, but for the exigencies at the scene…, probable cause would have been discovered; and… the test would have been administered based on probable cause established by this… information," the admission of the test results into a later court hearing "is not unreasonable and would not violate" the person's Fourth Amendment rights.[13]

As the Georgia court noted in *Cooper*, several states have rejected the idea that a blood test 'search' may be predicated on mere involvement in a traffic accident, lacking a warrant or probable cause that the operator of the vehicle was under the influence. Both Maine's statute and subsequent judicial interpretation appear to be unique. Given these circumstances it is difficult to determine how Florida courts might interpret the proposed changes.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

A constituent brought this bill to me. His wife was involved in an accident where someone ran a red light and hit her. The person that caused the accident was never tested for any substance but his wife was tested at the hospital. His wife and child died as a result of the accident. This bill will require the blood testing of all parties that are in control of a vehicle.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On Thursday, February 21, 2008, the Committee on Infrastructure reported the bill favorably with one amendment. The amendment clarifies that the person whose blood is tested shall pay the costs of the test. The test may be performed at the scene of the accident by a person authorized to draw blood under current law, or at the nearest facility where the blood can be drawn as required under current statute.

[11] 928 A.2d 753 at 757. Emphasis in original.

[12] The theory behind "inevitable discovery" generally holds that evidence gathered unlawfully might still be admissible at trial if the court determines that a lawful investigation would have inevitably led to the discovery of the same evidence.

[13] *State of Maine v. Richard Cormier*, 928 A.2d 753 (2007), 761.