

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 9 Use of a Wireless Communications Device While Operating a Motor Vehicle

**SPONSOR(S):** Criminal Justice Subcommittee; Slosberg and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 270

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 3 N, As CS	Cox	Cunningham
2) Judiciary Committee			

### SUMMARY ANALYSIS

Currently, s. 316.305, F.S., prohibits a person from using a wireless communication device (WCD) while operating a motor vehicle to:

- Manually type or enter multiple letters, numbers, symbols, or other characters into the device; or
- Send or read data for the purpose of nonvoice interpersonal communication, which in addition to texting, includes e-mailing and instant messaging.

Vehicular homicide, a second degree felony, is the killing of a human being, or the killing of an unborn child by any injury to the mother, caused by the operation of a vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another. The offense is reclassified to a first degree felony if:

- At the time of the accident, the person knew or should have known the accident occurred; and
- The person failed to give information and render aid as required by s. 316.062, F.S.

Courts have held that vehicular homicide cannot be proven without proving the elements that constitute reckless driving.

Florida law does not specifically make it a crime for a person to cause the death of another while operating a vehicle and using a WCD. Depending on the facts of the case, a person who kills another while operating a vehicle and using a WCD could be prosecuted for vehicular homicide, provided the state can prove that using the WCD while operating the vehicle constituted reckless driving and resulted in the death.

The bill amends s. 782.071, F.S., to expand the definition of vehicular homicide to include instances in which a person kills another by operating a motor vehicle while using a WCD in violation of s. 316.305, F.S. (the texting-while-driving ban). The offense is a second degree felony, but is reclassified to a first degree felony if:

- At the time of the accident, the person knew or should have known the accident occurred; and
- The person failed to give information and render aid as required by s. 316.062, F.S.

Unlike the current vehicular homicide statute, the bill does not require proof that the driver using the WCD in violation of the texting-while-driving ban operated the vehicle recklessly.

The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of this bill. However, there will likely be a negative prison bed impact to the Department of Corrections because the bill expands the application of the vehicular homicide offense.

The bill is effective October 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Traffic Fatalities – Wireless Communication Devices

According to the Florida Department of Highway Safety and Motor Vehicles (DHSMV), there were 316,943 total crashes in Florida in 2013, up from 281,340 in 2012.<sup>1</sup> Mirroring trends nationally, traffic fatalities in Florida have been trending downward.<sup>2</sup> In 2013, Florida's 2,407 traffic fatalities represented a 1.0 percent decrease from the previous year.<sup>3</sup>

DHSMV is unable to determine how many of Florida's traffic fatalities are a direct result of distracted driving as this information may or may not show up on a crash report. However, the National Highway Traffic Safety Administration (NHTSA) reports that ten percent of fatal crashes nationwide in 2011 were reported as distraction-affected crashes.<sup>4</sup> NHTSA further reports that "text messaging creates a crash risk 23 times worse than driving while not distracted,"<sup>5</sup> largely because "sending or receiving a text takes a driver's eyes from the road for an average of 4.6 seconds, the equivalent – at 55 mph – of driving the length of an entire football field."<sup>6</sup> Researchers have identified texting-while-driving as among the most dangerous of distractions because it involves "manual, visual, and cognitive distraction simultaneously."<sup>7</sup>

#### The Texting-While-Driving Ban

Currently, s. 316.305, F.S. (the texting-while-driving ban), prohibits a person from using a wireless communication device<sup>8</sup> (WCD) while operating a motor vehicle to:

- Manually type or enter multiple letters, numbers, symbols, or other characters into the device; or
- Send or read data for the purpose of nonvoice interpersonal communication, which in addition to texting, includes e-mailing, and instant messaging.

The offense is punishable as a noncriminal traffic infraction, punishable as a nonmoving violation,<sup>9</sup> and enforcement is only permitted as a secondary offense.<sup>10</sup>

The texting-while-driving ban does not apply to a person operating a vehicle who is:

- Performing official duties as:
  - An operator of an authorized emergency vehicle;
  - A law enforcement or fire service professional; or
  - An emergency medical services professional;
- Reporting an emergency or criminal or suspicious activity to law enforcement authorities;

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<sup>1</sup> 2013 Traffic Crash Facts, <http://www.flhsmv.gov/html/safety.html> (last visited February 17, 2015).

<sup>2</sup> The National Highway Traffic Safety Administration (NHTSA) 2013 Fatality Analysis Reporting System (FARS) data shows a 3.1 percent decrease in overall highway deaths from the previous year and a nearly 25 percent decline since 2004. *Roadway Deaths Fall Nearly 25 Percent in a Decade, Fatality Rates at a Historic Low*, NHTSA December 19, 2014, press release, <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2014/traffic-deaths-decline-in-2013> (last visited on February 17, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Distracted Driving 2011*, U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA)(on file with Criminal Justice Subcommittee). In 2011, there were a total of 29,757 fatal crashes in the United States involving 43,668 drivers. In those crashes, 32,367 people were killed. In 2011, 3,020 fatal crashes occurred that involved distraction [10% of all fatal crashes].

<sup>5</sup> *Id.* While this information may be accessed via the NHTSA website, the study itself was authored by Rebecca L. Olson, Richard J. Hanowski, Jeffrey S. Hickman, and Joseph Bocanegra of the Virginia Tech Transportation Institute.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Section 316.305(3)(a), F.S., defines a "wireless communications device" as any handheld device used or capable of being used in a handheld manner, that is designed or intended to receive or transmit text or character-based messages, access or store data, or connect to the Internet or any communications service as defined in s. 812.15 and that allows text communications.

<sup>9</sup> A second or subsequent violation within 5 years after the date of a prior conviction for a violation is a noncriminal traffic infraction, punishable as a moving violation as provided in ch. 318, F.S. Section 316.305(4)(b), F.S.

<sup>10</sup> Section 316.305(5), F.S. Because texting while driving is a secondary offense, a driver must be first pulled over for a violation of another traffic law before that driver may be cited for violating the texting-while-driving ban.

- Receiving messages that are:
  - Related to the operation or navigation of the motor vehicle;
  - Safety-related information, including emergency, traffic, or weather alerts;
  - Data used primarily by the motor vehicle; or
  - Radio broadcasts;
- Using a device or system for navigation purposes;
- Conducting wireless interpersonal communication that does not require manual entry of multiple letters, numbers, or symbols, except to activate, deactivate, or initiate a feature or function;
- Conducting wireless interpersonal communication that does not require reading text messages, except to activate, deactivate, or initiate a feature or function; or
- Operating an autonomous vehicle in autonomous mode.<sup>11</sup>

### **Vehicular Homicide**

Vehicular homicide, a second degree felony,<sup>12</sup> is the killing of a human being, or the killing of an unborn child<sup>13</sup> by any injury to the mother, caused by the operation of a vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another.<sup>14</sup> The offense is reclassified to a first degree felony<sup>15</sup> if:

- At the time of the accident, the person knew or should have known the accident occurred; and
- The person failed to give information and render aid as required by s. 316.062, F.S.<sup>16,17</sup>

Courts have held that vehicular homicide cannot be proven without proving the elements that constitute reckless driving.<sup>18</sup> A person commits the offense of “reckless driving” if he or she drives a vehicle in willful or wanton<sup>19</sup> disregard for the safety of persons or property.<sup>20</sup> In determining whether a person was driving recklessly, the essential inquiry is whether the defendant knowingly drove the vehicle in such a manner and under such conditions as was likely to cause death or great bodily harm.<sup>21</sup> A person need not have foreseen the specific circumstances causing the death of the particular victim, it is sufficient that he or she should have reasonably foreseen that the same general type of harm might occur if he or she knowingly drives the vehicle under circumstances that would likely cause the death of another.<sup>22</sup>

Florida law does not specifically make it a crime for a person to cause the death of another while operating a vehicle and using a WCD. However, depending on the facts of the case, a person who kills another while operating a vehicle and using a WCD could be prosecuted for vehicular homicide,

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<sup>11</sup> Section 316.305(3)(b), F.S.

<sup>12</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>13</sup> Section 775.021(5)(e), F.S., defines the term “unborn child” to mean “a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb.”

<sup>14</sup> Section 782.071, F.S.

<sup>15</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>16</sup> Section 782.071(1), F.S.

<sup>17</sup> Section 316.062, F.S., requires the driver of any vehicle involved in a crash resulting in injury to or death of any person or damage to any vehicle or other property to give his or her name, address, and the registration number of the vehicle he or she is driving. Upon request and if available, the person must exhibit his or her license or permit to drive, to any person injured in such crash or to the driver or occupant of or person attending any vehicle or other property damaged in the crash and must give such information and, upon request, exhibit such license or permit to any police officer at the scene of the crash or who is investigating the crash. Additionally, the person must render to any person injured in the crash reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary, or if such carrying is requested by the injured person.

<sup>18</sup> *W.E.B. v. State*, 553 So.2d 323, 326 (Fla. 1st DCA 1989); *Berube v. State*, 6 So.3d 624 (Fla. 5th DCA 2008).

<sup>19</sup> “Willful” means intentionally, knowingly, and purposely. “Wanton” means with a conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property. *W.E.B.*, 553 So.2d at 326.

<sup>20</sup> Section 316.192, F.S. A first conviction of reckless driving is punishable by no more than 90 days imprisonment or a fine of \$25-\$500, or by both. A second or subsequent conviction is punishable by no more than six months or by a fine of not less than \$50-\$1,000, or by both.

<sup>21</sup> The Florida Supreme Court describes recklessness as a degree of negligence that falls short of culpable negligence, but more than a mere failure to use ordinary care. *McCreary v. State*, 371 So.2d 1024, 1026 (Fla. 1979).

<sup>22</sup> *W.E.B.*, 553 So.2d at 326.

provided the state can prove that using the WCD while operating the vehicle constituted reckless driving and resulted in the death.

### **Effect of the Bill**

The bill amends s. 782.071, F.S., to expand the definition of vehicular homicide to include instances in which a person kills another by operating a motor vehicle while using a WCD in violation of s. 316.305, F.S. (the texting-while-driving ban). The offense is a second degree felony, but is reclassified to a first degree felony if:

- At the time of the accident, the person knew or should have known the accident occurred; and
- The person failed to give information and render aid as required by s. 316.062, F.S.

Unlike the current vehicular homicide statute, the bill does not require proof that the driver using the WCD in violation of the texting-while-driving ban operated the vehicle recklessly. As a result, any driver who kills another while using a WCD in violation of the texting-while-driving ban can be charged with vehicular homicide, regardless of whether the person operated the vehicle recklessly.

The bill also amends ss. 921.0022 and 960.03, F.S., to conform cross-references, and reenacts s. 948.062(1)(j), F.S., incorporating the bill's changes to s. 782.071, F.S.

### **B. SECTION DIRECTORY:**

Section 1. Amends s. 782.071, F.S., relating to vehicular homicide.

Section 2. Amends s. 921.0022, F.S., relating to the Criminal Punishment Code; offense severity ranking chart.

Section 3. Amends s. 960.03, F.S., relating to definitions; ss. 960.01-960.28.

Section 4. Reenacts s. 948.062, F.S., relating to reviewing and reporting serious offenses committed by offenders placed on probation or community control.

Section 5. Provides an effective date of October 1, 2015.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

The Criminal Justice Impact Conference has not yet met to determine the fiscal impact of this bill. However, the bill may have a negative prison bed impact on the Department of Corrections because it expands the application of the vehicular homicide offense. The extent of the impact is unknown, however, because in many instances, a person who causes the death of another by operating a vehicle while using a WCD could currently be prosecuted under this statute.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 11, 2015, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment amends s. 782.071, F.S., to expand the definition of vehicular homicide to include instances in which a person kills another by operating a motor vehicle while using a WCD in violation of s. 316.305, F.S.

This bill analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.