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: CS/SB 1324

SPONSOR: Criminal Justice Committee and Senator Campbell

SUBJECT: Vehicular Homicide

DATE: April 20, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.			JU	
3.			TR	
4.			RC	
5.				
6.				

I. Summary:

The Committee Substitute for Senate Bill 1324 creates a permissive inference for one of the elements that the State must prove beyond a reasonable doubt in a vehicular homicide case. The "reckless operation" of a motor vehicle element may be presumed, under this bill, by proof that the defendant had not slept within the 24 hours preceding the commission of the crime, along with other competent evidence.

This bill substantially amends the following section of the Florida Statutes: 782.071, F.S.

II. Present Situation:

Vehicular Homicide

Section 782.071, F.S., currently allows prosecution and punishment of a defendant whose reckless driving causes the death of a human being or the death of a viable fetus by any injury to the mother. Vehicular homicide is a second degree felony, punishable by up to 15 years imprisonment, although it may be a first degree felony under certain circumstances such as failing to render aid or provide information when the defendant knew or should have known that the accident occurred.

The vehicular homicide statute conveys a right of action for civil damages under the Wrongful Death Act, s. 768.19, F.S.

The reckless element required to prove vehicular homicide is a lesser standard than the culpable negligence standard required for proof under the manslaughter statute, s. 782.07, F.S., *McCreary v. State*, 371 So. 2d 1024, 1026 (Fla. 1979). Manslaughter, which can also serve as a basis for a

charge against a driver, is punished as a second-degree felony (15 year maximum sentence). Culpable negligence under manslaughter requires proof of a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences." *Id.* The court has defined recklessness under the vehicular homicide statute as that "where the degree of negligence falls short of culpable negligence but where the degree of negligence is more than a mere failure to use ordinary care." *Id.*

In *McCreary*, the court held that the state established the reckless element in vehicular homicide where the defendant ran a stop sign causing the death of one of his passengers and the evidence showed that the stop sign was clearly visible from a distance of 300 to 400 feet; the defendant, (although not intoxicated), had consumed several glasses of beer just prior to the accident, and the defendant drove into the intersection without slowing down. *Id*. at 1025.

However, momentary inattentiveness alone is insufficient to support a reckless driving or vehicular homicide conviction. *State v. Esposito,* 642 So. 2d 25 (Fla. 4th DCA 1994). In *Esposito*, the defendant, a bus driver, struck and killed a pedestrian in a crosswalk, had an unobstructed view, was traveling at only 15 mph, and an expert concluded that the defendant failed to look for pedestrians and was not paying attention. If the state is only able to show a failure to use ordinary care, then it will not obtain a conviction for vehicular homicide. *Id*.

Burden of Proof – Due Process – Rebuttable Presumptions and Permissive Inferences in Criminal Law

The Florida Standard Jury Instructions in Criminal Cases (as amended through May 9, 2002, 824 So.2d 881) provide for the following instructions to the jury in a vehicular homicide trial:

> To prove the crime of Vehicular Homicide, the State must prove more than a failure to use ordinary care, and must prove the following three elements beyond a reasonable doubt:
>
> 1. (Victim) is dead;
> 2. The death was caused by the operation of a motor vehicle by (defendant).
> 3. (Defendant) operated the motor vehicle in a reckless manner likely to cause the death of or great bodily harm to another person.
>
> An intent by the defendant to harm or injure the victim or any other person is not an element to be proved by the State.

It is the State's burden to prove every element that constitutes a crime beyond a reasonable doubt. The burden of proof must not shift to the defendant.

In the trial of criminal cases, certain evidentiary "tools" are recognized. These are called presumptions (of fact) and inferences (of one fact based upon the proof of another).

A *mandatory presumption* instructs the jury (the "fact-finder" in a trial) that it *must* infer the presumed fact if the State proves certain predicate facts. *Francis v. Franklin,* 471 U.S. 307, 314 n.2 (1985). A *mandatory rebuttable presumption* requires the jury to find the presumed element once the State has proven the predicate facts giving rise to the presumption, unless the defendant

persuades the jury that such a finding is unwarranted. *Id.* at 314, n. 2. Mandatory presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of the offense being tried. *Id.* at 314; *State v. Brake,* 796 So.2d 522 (Fla. 2001).

Contrasting a *permissive inference*, with a mandatory presumption – the inference *allows*, but does not require, the trier of fact to infer an elemental fact upon proof of a basic fact and places no burden of proof on the defendant. *Marcolini v. State,* 673 So.2d 3 (Fla. 1996) (see also *Franklin,* 471 U.S. at 314 (1985): 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. *emphasis added*)

In 1990, in the *Rolle* case, the Florida Supreme Court found that one of the elements in the DUI/DUBAL statute created a permissive inference, and did not require the jury to make a finding of fact, and was therefore constitutional. Specifically, the statute was worded as follows:

> If there was at the time 0.10 percent or more by weight of alcohol in the person's blood, that fact *shall be prima facie evidence* that the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired. s. 316.1934(2), F.S. (1985).

In the trial of the felony DUI case, the court instructed the jury as follows: "If you find from the evidence that the Defendant had a blood alcohol level of .10 percent or more, that evidence *would be sufficient by itself to establish* that the Defendant was under the influence of alcohol to the extent that his normal faculties were impaired. However, such evidence may be contradicted or rebutted by other evidence." *State v. Rolle,* 560 So.2d 1154 (Fla. 1990) (emphasis added).

The Supreme Court found that the statute and the jury instruction derived from it created a permissive inference, not a mandatory presumption, and was, therefore, constitutional. *Id. at 1157.*

A different result was reached by the Supreme Court of Florida in 2001, however, as it related to the language of the luring or enticing a child statute. *State v. Brake,* 796 So.2d 522 (Fla. 2001). The language before the court for review, in s. 787.025(2)(b), F.S., stated in part:

> For purposes of this section, the luring or enticing, or attempted luring or enticing, of a child under the age of 12 into a structure, dwelling, or conveyance without the consent of the child's parent or legal guardian *shall be prima facie evidence* of other than a lawful purpose.

The court found this language did not meet constitutional muster. The court cited the U.S. Supreme Court case of *Leary v. United States,* 395 U.S. 6 (1969) which stated: "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.* at 36

The Florida Supreme Court, in the *Brake* case, noted that the Defendant's unlawful intent element of the offense of luring a child was proven under the statute by the presumption based

on the proof of lack of parental consent. The court stated that it *could not find with substantial assurance* that the Defendant's unlawful intent could be so presumed, therefore that subsection of the luring statute was unconstitutional. *Id.* at 529.

Pending Legislation

The Senate is considering legislation at the time of this writing that would amend the language of the luring and enticing statute (s. 787.025, F.S.) discussed above to correct the constitutional infirmity. (see Committee Substitute for Senate Bill 218 and the companion House Bill 1713) The pertinent language in the current bills reads as follows: (Note: bold text represents new language underlined in bill.)

> **If the defendant lured or enticed, or attempted to lure or entice,** a child under the age of **16** into a structure, dwelling, or conveyance without the consent of the child's parent or legal guardian, **that fact does not give rise to a presumption that the defendant committed or attempted to commit such luring or enticing for** other than a lawful purpose, **but may be considered with other competent evidence in determining whether the defendant committed or attempted to commit such luring or enticing for other than a lawful purpose.**

(see also current s. 893.13(8)(b), F.S., for similar language as it relates to prescription drug fraud.)

III. Effect of Proposed Changes:

The Committee Substitute for SB 1324 creates a permissive inference for one of the elements that the State must prove beyond a reasonable doubt in a vehicular homicide case. The "reckless operation" of a motor vehicle element may be inferred, under this bill, by proof that the defendant had not slept within the 24 hours preceding the commission of the crime, along with other competent evidence.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not considered this bill with regard to its potential impact on prison beds, but it is not likely that a significant impact would result from its passage.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.