The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1244
INTRODUCER:	Senator Simmons
SUBJECT:	Driving Under the Influence
DATE:	January 15, 2016
REVISED:	1/25/16

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McAloon	Cibula	JU	**Favorable**
2.			ACJ	
3.			AP	

I. Summary:

SB 1244 increases the penalties on a person who refuses to submit to an alcohol test, incidental to lawful detention, while operating a motor vehicle. The penalties include a fine, probation, and points assessed against an individual's license. The increased penalties for first refusal closer resemble the penalties for a first-time DUI conviction under Florida law.

The bill also increases penalties on a person who refuses to submit to an alcohol test, incidental to lawful detention, and whose driving privileges were suspended for a prior refusal to submit to testing. In addition to the potential fines and jail time under current law, the person must have an ignition interlock device placed on his or her vehicle for a period of at least 1 year. Furthermore, a court may not withhold adjudication of guilt, or the imposition of a sentence or penalty, on a person who has had a prior license suspension for refusing testing.

II. Present Situation:

Refusal to Submit to Alcohol Testing

Any person who accepts the privilege of operating a motor vehicle within this state is deemed to have given his or her consent to submit to an approved test of the alcohol content of his or her blood, breath, or urine.[1] The test must be incidental to a lawful arrest, and administered at the request of a law enforcement officer who has a reasonable belief such person was driving a motor vehicle while under the influence of alcoholic beverages.[2]

The Department of Motor Vehicles will administratively suspend a person's driving privileges for 1 year after the first refusal of alcohol testing.[3] The second refusal to consent to a test will

[1] Section 316.1932(1)(a)1.a., F.S.
[2] *Id*.
[3] Section 322.2615(1)(b)1.a., F.S.

result in an administrative suspension as well as criminal charges. A second refusal occurs when a person's driving privileges were suspended for a prior refusal, and he or she refuses to submit to an alcohol test for a second time. A person's motor vehicle license is suspended by the Department of Motor Vehicles for 18 months if found liable for a second refusal.[4] A person who refuses to submit to a alcohol test for a second time faces criminal liability for a first degree misdemeanor, punishable by up to 1 year in jail and $1,000 fine.[5]

Florida's DUI Laws

Florida's current DUI laws provide for both administrative and criminal sanctions. A first conviction results in a fine of not less than $500 or more than $1,000.[6] If the individual's blood or breath-alcohol level is 0.15 or higher, or if he or she has a minor in the vehicle, the fine is not less than $1,000 or more than $2,000.[7] There is a community service requirement of 50 hours.[8] A first-time conviction can also lead to imprisonment for a period of no more than 6 months and up to 1 year of probation.[9]

Breath Test Refusal Rates

In 2014, the U.S. Department of Transportation National Highway Traffic Safety Administration released a study regarding breath test refusal rates.[10] The study found Florida had a breath test refusal rate of 82 percent in 2011, as compared to a rate of 40 percent in 2005. The National Highway Traffic Safety Administration also found the average refusal rate for the country as a whole ranged from 19 to 25 percent. State authorities reported to the authors of the study that refusal rates will remain high if the sanctions for failing a breath-alcohol concentration test are more severe than those for refusing to submit to the test. State authorities recommended the license suspension periods for first and repeat refusals be at least as severe as those penalties for driving under the influence.

Ignition Interlock Device

The Florida Legislature's Office of Program Policy Analysis & Government Accountability conducted a study researching ignition interlock devices and DUI recidivism rates.[11] An ignition interlock device prevents the start of a vehicle with a breath sample above .025, collects data, and records and stores visual evidence of device use.[12] Research shows that ignition interlock devices, while installed, were more effective at reducing re-arrest rates for alcohol-impaired driving when compared to other sanctions, such as license suspensions.[13] The study found the six

[4] Section 316.1939(1)(c), F.S.
[5] Sections 316.1939(1)(e), 322.2615, F.S.
[6] Section 316.193(2)(a)-(b), F.S.
[7] Section 316.193(4), F.S.
[8] Section 316.193 (6)(a), F.S.
[9] Sections 316.193 (2)(a), 316.193 (5)(6), F.S.
[10] Esther S. Namuswe, Heidi L. Coleman, Amy Beming, *Breath Test Refusal Rates in the United States – 2011 Update*, U.S. Dept. of Transportation National Highway Traffic Safety Administration (March 2014).
[11] Office of Program Policy Analysis & Government Accountability, *Ignition Interlock Devices and DUI Recidivism Rates*, (December 2014).
[12] *Ignition Interlock Program* at www.flhsmv.gov.
[13] Office of Program Policy Analysis & Government Accountability, *supra* note 11 at 1.

month recidivism rate for first-time DUI offenders that were not required to install an ignition interlock device was 1.74 percent. When compared, the recidivism rate for first-time offenders required to use the ignition interlock device was less with a rate of 0.34 percent.[14] However, the study also found that only 49 percent of Florida DUI offenders installed an ignition interlock device, as required, after completing their period of license revocation.[15]

Florida Refusal to Consent Case Law

In *Williams v. State*, an opinion issued by the Fifth District Court of Appeal in June 2015, the defendant was convicted of a first degree misdemeanor under Florida's refusal to submit statute for a second refusal to submit to a breath test. In a challenge to the constitutionality of the statute, the defendant argued that the statute violated the Fourth Amendment, which prohibits unreasonable searches and seizures. Specifically, he argued it violated the unconstitutional conditions doctrine as set forth in the 2013 opinion of the United States Supreme Court in *Missouri v. McNeely*.[16] Thus, the issue presented in *Williams* was whether it is constitutional to punish a person criminally for refusing to submit to a breath-alcohol test when the officer conducting the test does not have a warrant.

The unconstitutional conditions doctrine prohibits the government from denying a benefit to a person because he or she exercises a constitutional right.[17] However, the Constitution does not prohibit every government imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.[18] Generally, warrantless searches are presumptively unreasonable unless they fall within a recognized exception to the warrant requirement.[19] The warrant requirement ensures that inferences to support the search are drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the task of solving the crime.[20]

In *McNeely*, the Court was asked to determine whether the natural metabolization of alcohol in the bloodstream presents an inherent necessity that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in drunk-driving cases.[21] It concluded that an inherent necessity for nonconsensual blood testing did not automatically exist in all drunk-driving cases.[22] The Court held that the review of a warrantless, nonconsensual blood test must always be examined on a case-by-case basis and founded on the totality of the circumstances.[23]

The Fifth DCA, in *Williams*, found that the state's implied consent statue was not an unconstitutional condition or a violation of a person's Fourth Amendment rights. Instead, the

[14] *Id*. at 8.
[15] *Id*. at 4-5.
[16] *Williams v. State*, 167 So. 3d 483, 493 (Fla. 5th DCA 2015), *reh'g denied* (July 1, 2015), *review granted*, No. SC15-1417, 2015 WL 9594290 (Fla. Dec. 30, 2015).
[17] *Williams*, 167 So. 3d at 486 (quoting *Koontz v. St Johns river Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013)).
[18] *Id.* at 486 (quoting *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980)).
[19] *See, e.g., Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013).
[20] *Williams*, 167 So. 3d at 487 (quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966)).
[21] *McNeely*, 133 S. Ct. at 1556.
[22] *Id*.
[23] *Id.*

Williams court followed the majority of courts in holding that statutory implied consent does not constitute an automatic exception to the warrant requirement.[24] The defendant did not necessarily consent to a breath test when he got behind the wheel of his car that night.[25] However, the *Williams court* found the statute, as applied, is constitutional under a general reasonableness test.[26]

The *Williams court* found that many other courts have dealt with a criminal refusal to submit statute have not struck it down as unconstitutional.[27] The court balanced the state's legitimate interest against the degree to which the breath test would have intruded upon the defendant's privacy.[28] The state, according to the court, has legitimate interest in decreasing and prosecuting drunk driving. The state also has a compelling interest in protecting lives, securing the safety of public roads, and deterring drivers from operating vehicles while intoxicated.[29] Additionally, the court found a breath test is minimally intrusive, compared to the blood draw in *McNeely*, which heavily favors finding it reasonable.[30] The *Williams* court held the refusal to submit statute as constitutional because the state's compelling interest outweighed the degree of intrusiveness on defendant's privacy.

The Florida Supreme Court has accepted review the Fifth DCA opinion in *Williams v. State*.[31] According to the deadlines set by the Court, the parties should be in the process of writing and filing their briefs.[32]

Hawaii Refusal to Consent Case Law

The court in *Williams v. State*, cited to a Hawaii appellate court opinion in support of its position that no state has struck down a refusal to consent law as unconstitutional. Since the rendering of the decision, the Hawaii Supreme Court overruled the appellate court. In *State v. Won*, the Hawaii Supreme Court found the Hawaii Constitution does not determine whether bodily intrusions are lawful under a balancing test for reasonableness.[33] Instead, a warrantless search is only allowed when there is a rooted exception in law present.[34] The Hawaii Supreme Court further stated a balancing approach to determine reasonableness has not been adopted in the state and does not comport with an individual's rights against warrantless searches guaranteed by the Hawaii Constitution.[35]

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[24] *Williams*, 167 So. 3d at 491.
[25] *Id.* at 491.
[26] *Id*. at 492.
[27] *Id*.; *see also State v. Bernard*, 859 N.W.2d 762 (Minn. 2015); *North Dakota v. Birchfield*, 858 N.W. 2d 302 (N.D. 2015).
[28] *Williams*, 167 So. 3d at 493.
[29] *Id*.; *see also Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."); *State v Birchfield*, 858 N.W. 2d 302, 309 (N.D. 2015).
[30] *Williams*, 167 So. 3d at 493-494.
[31] *Williams v. State*, No. SC15-1417, 2015 WL 9594290 (Fla. 2015).
[32] *Id*.
[33] *State v. Won*, 361 P.3d 1195 (2015).
[34] *Id.* at 1215.
[35] *Id.* at 1216.

III. Effect of Proposed Changes:

SB 1244 amends section 316.1939, F.S., to require stricter penalties for all first time and subsequent alcohol test refusals. The heightened penalties reduce the incentive for a person to refuse submission to testing for the first time in order to receive an advantage of a lesser penalty. Under the proposed law, a person who refuses to submit to testing for the first time faces the following additional penalties:

- A fine of at least $500 but not more than $1,000;
- Probation for 6 months; and
- 4 points assessed against his or her driver license.

The bill also increases penalties on a person whose driving privilege was suspended for a prior refusal and he or she subsequently refuses to comply with requirements for testing. In addition to the potential for fines and jail time under current law the bill requires the court to order the placement of an ignition interlock device upon all vehicles that are owned and routinely operated by an individual convicted of a second refusal. The ignition interlock device must remain on the vehicle for at least 1 year at the convicted individual's sole expense. Furthermore, the court may not suspend, defer, or withhold adjudication of guilt or the imposition of a sentence or penalty for an individual who fails to comply with the informed consent statute for a second time.

The bill takes effect October 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of Highway Safety and Motor Vehicles estimated that it costs $420,000 to administer the ignition interlock device program in Fiscal Year 2013-2014.[36] These costs include salaries and benefits for department staff who work directly with ignition interlock device vendors, the DUI programs, and indirect costs. The department receives a $12 interlock fee for each installation.[37] This fee is collected by the vendors and in Fiscal Year 2013-2014, the department received $187,596 in interlock fees. The figures will rise due to the fact the bill requires mandatory placement of an ignition interlock device for a second refusal to submit to an alcohol test.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The proposed changes do not interfere with a person's ability to refuse alcohol testing as is presently recognized. The proposed changes enhance the penalties for refusing to comply.

VIII. Statutes Affected:

The bill creates section 316.1939 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[36] Office of Program Policy Analysis & Government Accountability, *supra* note 11 at 4.
[37] Section 322.2715(5), F.S. requires vendors to collect and remit $12 for each installation to the department, which is deposited into the Highway Safety Operating Trust Fund to administer the ignition interlock device program.