

**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.)

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Prepared By: The Professional Staff of the Committee on Infrastructure and Security

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BILL: CS/SB 728

INTRODUCER: Infrastructure and Security Committee and Senator Stargel

SUBJECT: Threats

DATE: January 14, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Miller	IS	<b>Fav/CS</b>
2.			CJ	
3.			AP	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 728 prohibits threats to use a firearm or weapon with intent to do bodily harm to any person or to do damage to any property of any person, and includes as a violation of law a threat of such *future* use if the threat is sufficient to cause alarm in a reasonable person. The bill also includes a threat of *future* throwing, projecting, placing, or discharging of any destructive device in the existing prohibition against such threats, but without the additional element of sufficiency to cause alarm in a reasonable person. A conviction for a current or future threat to use a firearm or weapon would be included in the same section of law currently applicable to a threat to throw, project, place, or discharge any destructive device, a second degree felony. Under the bill, a person is not in violation if he or she threatens to use a firearm or any other weapon in lawful self-defense, or in lawful defense of others or of property.

The bill also revises existing prohibitions against making a false report, with intent to deceive, mislead, or misinform any person, concerning the *current or future* placing or planting or any bomb, dynamite, other deadly explosive, or weapon of mass destruction, or concerning the *current or future* use of firearms in a violent manner against a person. The penalty for a violation remains as a second degree felony.

The result of application of the bill's revisions in a given criminal case appears to be unclear. See "Effect of Proposed Changes" for details.

The Criminal Justice Impact Conference has not yet reviewed the bill.  
The bill takes effect October 1, 2020.

## II. Present Situation:

### *Definitions*

Chapter 790, Florida Statutes, relating to weapons and firearms, among others, defines the following terms for purposes of that chapter:

- Destructive device “means any bomb, grenade, mine, rocket, missile, pipebomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary, explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled; any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms;<sup>1</sup> any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one-half inch or more in diameter; and ammunition for such destructive devices, but not including shotgun shells or any other ammunition designed for use in a firearm other than a destructive device.”<sup>2</sup>
- Firearm “means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun.”<sup>3</sup>
- Weapon “means any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device or other deadly weapon *except* a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife.”<sup>4</sup>

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<sup>1</sup> For the purposes of the National Firearms Act, the term “destructive device” means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term “destructive device” shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 7684(2), 7685, or 7686 of title 10, United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes. 26 U.S.C. 5845(f).

<sup>2</sup> The term under Florida law does not include “a device which is not designed, redesigned, used, or intended for use as a weapon; any device, although originally designed as a weapon, which is redesigned so that it may be used solely as a signaling, line-throwing, safety, or similar device; any shotgun other than a short-barreled shotgun; or any nonautomatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for use for the hunting of big game.” Section 790.001(4), F.S.

<sup>3</sup> The term does not include an antique firearm unless the antique firearm is used in the commission of a crime. Section 790.001(6), F.S.

<sup>4</sup> Section 790.001(13), F.S.

Apparently, depending on the facts of a given criminal case, a “destructive device” may also be a “firearm” or a “weapon,” but a “weapon” is not a “firearm.” Further, *all* firearms may not meet the definition of “destructive device;” *e.g.*, many pistols do not have barrels with a bore of one-half inch or more in diameter. Additionally, the definition of “weapon” includes items that do not appear to meet the definition of “destructive device,” and the broad phrase “other deadly weapon,” may also not meet the definition of “destructive device,” depending on the item used in a given criminal case.

***Making, Possessing, Throwing, Projecting, Placing or Discharging any Destructive Device***

Section 790.161, F.S., prohibits willfully<sup>5</sup> and unlawfully<sup>6</sup> making, possessing,<sup>7</sup> throwing, projecting, placing, or discharging any destructive device, or attempting to do so. A violation is a third degree felony, punishable by a term of imprisonment not exceeding five years.<sup>8</sup> However, if the act:

- Is committed with intent to do bodily harm to any person or to do property damage, or if the result is a disruption of governmental operations, commerce, or the private affairs of another person, a violation is increased to a second degree felony, punishable by a term of imprisonment not exceeding 15 years.<sup>9</sup>
- Results in bodily harm to another person or in property damage, a violation is elevated to a first degree felony, punishable by a term of imprisonment not exceeding 30 years or, when provided by statute, an imprisonment term not exceeding life.<sup>10</sup>
- Results in the death of another person, a violation is a capital felony, punishable by death or by life imprisonment with no eligibility for parole.<sup>11</sup>

A conviction under s. 790.161, F.S., requires the State to prove that a defendant acted intentionally, knowingly, and purposely.<sup>12</sup>

In contrast to the State’s burden of proving a defendant acted intentionally, knowingly, and purposely for a conviction under s. 790.161, F.S., a person who unlawfully throws, projects, places, or discharges a destructive device or bomb resulting in any bodily harm to another person, *regardless of intent or lack of intent to cause such harm*, violates s. 790.1615, F.S., and commits a first degree misdemeanor, punishable by a term of imprisonment not exceeding one

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<sup>5</sup> Meaning intentionally, knowingly, and purposely. See Florida Criminal Jury Instruction 10.7(a) available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited December 31, 2019).

<sup>6</sup> For illustration, it is not unlawful for the governing body of any municipality or county or the Division of State Fire Marshal of the Department of Financial Services to authorize the manufacture, possession, and use of destructive devices. Section 790.1612, F.S.

<sup>7</sup> To prove possession of a destructive device, the State must prove beyond a reasonable doubt that a defendant knew of the existence of the destructive device, and intentionally exercised control over that device. See Florida Criminal Jury Instruction 10.7(a) available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited December 31, 2019).

<sup>8</sup> Section 775.082(3)(e), F.S. Unless prosecuted as an adult, juvenile violations are processed in accordance with the provisions of ch. 985, F.S.

<sup>9</sup> Section 775.082(3)(d), F.S.

<sup>10</sup> Section 775.082(3)(b), F.S.

<sup>11</sup> Section 775.082(1)(a), F.S.

<sup>12</sup> See Florida Criminal Jury Instruction 10.7(a)-(d) available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited December 31, 2019).

year and up to \$1,000 fine.<sup>13</sup> Under s. 790.1615, F.S., if the result is great bodily harm, permanent disability, or permanent disfigurement, *regardless of intent or lack of intent*, a violation is a second degree felony, punishable by an imprisonment term not exceeding 15 years and up to a \$10,000 fine.<sup>14</sup>

Further, a person found guilty may be sentenced separately for any violation of s. 790.1615, F.S., and for any unlawful throwing, projecting, placing, or discharging of a destructive device or bomb committed during the same criminal episode.<sup>15</sup> However, a conviction for any unlawful throwing, projecting, placing, or discharging of a destructive device or bomb is not necessary for a conviction under s. 790.1615, F.S.<sup>16</sup>

### ***Threat to Throw, Project, Place, or Discharge Any Destructive Device***

Section 790.162, F.S. currently makes it unlawful for any person to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person.<sup>17</sup> A violation is a second degree felony, punishable by an imprisonment term not exceeding 15 years and up to a \$10,000 fine.<sup>18</sup>

Because the language of s. 790.162, F.S., references intent to do bodily harm or property damage, as also reflected in s. 790.161, F.S., and because the language of s. 790.1615, F.S., clearly excludes a defendant's intent as a required element of proof, a conclusion that a conviction under s. 790.162, F.S., also requires the State to prove that a defendant acted intentionally, knowingly, and purposely may be reasonable. However, no such proof is required for a conviction under s. 790.162, F.S.

To the contrary, currently applicable case law provides:

Section 790.161 provides that it is unlawful for any person to throw, place or discharge a destructive device with intent to do bodily harm or damage to property. Section 790.162, which essentially tracks the same language, was obviously intended to cover a *threat* to carry out the conduct proscribed by section 790.161. Viewed in this context, we think that section 790.162 requires only that the threat must convey an intent to do bodily harm or damage to property. Here, appellant's threat obviously conveyed this intent. Therefore, under our construction of the statute, *whether appellant intended to follow through with his threat was irrelevant*.<sup>19</sup>

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<sup>13</sup> Sections 775.082(4)(a) and 775.083(1)(d), F.S.

<sup>14</sup> Sections 775.082(3)(d) and 775.083(1)(b), F.S.

<sup>15</sup> Section 790.1615(3), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> Written threats may be prosecuted under s. 836.10, F.S.

<sup>18</sup> *Supra* note 14.

<sup>19</sup> *Reid v. State*, 405 So.2d. 500 (Fla. 2d DCA 1981). (*Emphasis added.*)

In addition:

[T]he State need not prove the existence of an actual destructive device. It is sufficient that the State prove that the defendant *threatened* to throw, place, or discharge a destructive device with the stated intent to do bodily harm to any person or with the stated intent to do damage to any property of any person, *regardless of whether the defendant had the actual ability to carry out that threat.*<sup>20</sup>

***False Reports –Planting a Bomb, Explosive, or Weapon of Mass Destruction; Arson; Use of Firearms in a Violent Manner***

Section 790.163, F.S. currently makes it unlawful for any person to make a false report, with intent to deceive, mislead, or otherwise misinform any person, concerning the placing or planting of any bomb, dynamite, other deadly explosive, or weapon of mass destruction,<sup>21</sup> or concerning the use of firearms in a violent manner against a person. Section 790.164, F.S., prohibits the same false reports, but also makes unlawful those concerning any act of arson or other violence to property owned by the state or any political subdivision.

For a conviction under s. 790.163, F.S., the State is required to prove three elements<sup>22</sup> beyond a reasonable doubt:

- The defendant made a false report to any person concerning the placing or planting of a bomb, dynamite, other deadly explosive, or a weapon of mass destruction or the use of firearms in a violent manner against a person,
- The defendant knew the report was false, and
- The report was made with intent to deceive, mislead or otherwise misinform any person.<sup>23</sup>

<sup>20</sup> *Valdes v. State*, 443 So.2d 221 (Fla. 1<sup>st</sup> DCA 1983). (*Emphasis added.*) See also Florida Criminal Jury Instruction 10.8 available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited January 1, 2020). “It is not necessary for the State to prove the defendant had the actual intent to cause [harm] [or] [damage], or that [he] [she] had the ability to carry out the threat, or that there was an actual destructive device.”

<sup>21</sup> Defined in s. 790.166, F.S., to mean “any device or object that is designed or intended to cause death or serious bodily injury to any human or animal, or severe emotional or mental harm to any human, through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; any device or object involving a biological agent; any device or object that is designed or intended to release radiation or radioactivity at a level dangerous to human or animal life; or any biological agent, toxin, vector, or delivery system.” The terms “bomb,” “dynamite,” or “deadly explosive” are not currently defined in the statutes or case law, but there is a definition of “explosive” in s. 790.001(5), F.S.: any chemical compound or mixture that has the property of yielding readily to combustion or oxidation upon application of heat, flame, or shock, including but not limited to dynamite, nitroglycerin, trinitrotoluene, or ammonium nitrate when combined with other ingredients to form an explosive mixture, blasting caps, and detonators; but not including: shotgun shells, cartridges, or ammunition for firearms; fireworks as defined in s. 791.01; smokeless propellant powder or small arms ammunition primers, if possessed, purchased, sold, transported, or used in compliance with s. 552.241; and black powder in quantities not to exceed that authorized by chapter 552, or by any rules adopted thereunder by the Department of Financial Services, when used for, or intended to be used for, the manufacture of target and sporting ammunition or for use in muzzle-loading flint or percussion weapons. The exclusions do not apply to the term “explosive” as used in the definition of “firearm” for purposes of ch. 790, F.S.

<sup>22</sup> See Florida Criminal Jury Instruction 10.9 available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited January 11, 2020).

<sup>23</sup> Under s. 790.163(3), F.S., proof that a person knowingly made a false report is prima facie evidence of that person’s intent to deceive, mislead, or otherwise misinform any person.

To prove a crime under s. 790.164, F.S., the State must prove four elements<sup>24</sup> beyond a reasonable doubt:

- The defendant made a false report to any person concerning the placing or planting of a bomb, dynamite, other deadly explosive, or a weapon of mass destruction or an act of arson or other violence to property,
- The property was owned by the State or any political subdivision,
- The defendant knew the report was false, and
- The report was made with intent to deceive, mislead, or otherwise misinform any person.

Under both sections of law, a violation is a second degree felony, punishable by an imprisonment term not exceeding 15 years and up to a \$10,000 fine.<sup>25</sup>

In a recent case<sup>26</sup> involving a 12 year-old student who was charged with violating s. 790.163, F.S., by stating, “I’m going to shoot up the classroom, April Fools,” in the classroom while “swapping April Fools’ jokes,” the court reasoned:

In this case, the objectionable “false report” was an April Fools’ Day joke that “threatened” a future shooting at a school. We addressed a similar issue involving a juvenile’s threat of harm at a school in *D.B.*<sup>27</sup> And what we held in *D.B.* was that threats of future violence do not violate s. 790.163.(1) because they are not “false reports.” We said that while s. 790.163(1) applies to false reports about live threats, such as “when a person knowingly makes a false report that a bomb or other deadly explosive has been placed or planted,” it does not apply to threats of future action, for example, to “‘blow up’ or ‘burn down’ [a] school at some time in the future.” [*Citations omitted.*]

As a matter of plain English, there is a distinction between a statement that “there is a bomb in the building” and a statement, such as [the defendant’s], that ‘I’m going to blow up the building.’” [*Citations omitted.*]

Applying *D.B.* here, the firearms-related prohibition in s. 790.163(1) plainly prohibits knowingly false and misleading reports about active shooting-type situations. But the statute does not reach future-oriented threats like the one uttered [in the subject case]. Because [the] April Fools’ Day joke threatened future shooting, it was not a “false report” made with

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<sup>24</sup> See Florida Criminal Jury Instruction 10.10 available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited January 11, 2020). According to the instruction, “Although the crime set forth in § 790.164(1), Fla. Stat., includes language covering a false report concerning the use of firearms in a violent manner against a person, that part of the statute does not pertain to a threat against property owned by the state or a political subdivision. For an allegation involving a false report concerning the use of firearms in a violent manner against a person, the trial judge should refer to Instruction 10.9.”

<sup>25</sup> *Supra* note 14.

<sup>26</sup> *J.A.W., A Child v. State*, No. 1D19-1974, Nov. 6, 2019 (Fla. 1<sup>st</sup> DCA).

<sup>27</sup> *D.B. v. State*, 825 So.2d 1042 (Fla. 1<sup>st</sup> DCA 2002).

intent to deceive, mislead, or otherwise misinform for purposes of s. 790.163(1). [*Citations omitted.*]<sup>28</sup>

### III. Effect of Proposed Changes:

Section 1 of the bill amends s. 790.162, F.S., to expand that section's applicability to also include threats involving a firearm or any weapon, as defined under current law. Under the bill, it is unlawful for any person to threaten:

- The use of a firearm or any weapon, including the future use if the threat is sufficient to cause alarm in a reasonable person, or
- To throw, project, place, or discharge any destructive device, including the future throwing, etc., of any destructive device.

Under the current case law applicable to s. 790.162, F.S., at least as to an apparently current or immediate threat to use a firearm or any weapon, the State would presumably need only to prove that a defendant threatened to use a firearm or any weapon, and that the defendant's threat conveyed an intent to do bodily harm or property damage. The State would apparently not be required to prove the existence of an actual firearm or weapon, not be required to prove a defendant had actual intent to carry out the threat, and not be required to prove a defendant had the actual ability to carry out the threat.

Future threats to use a firearm or any weapon, once any firearm or any weapon not currently included in the definition of "destructive device" is incorporated into the current statute, would presumably already be covered by s. 790.162, F.S., but the bill appears to add an additional element of required proof; *i.e.*, that the threat of future use is sufficient to cause alarm in a reasonable person. Whether, for example, the existence of an actual firearm or weapon, or the defendant's actual intent or ability to carry out a threat, would be deemed necessary or relevant to that element of proof is unknown. The outcome of application of the bill's revisions with respect to a future threat of use of a firearm or any weapon is unclear.

As drafted in the bill, sufficiency of alarm would not appear to be a required element of proof with respect to a current or future threat to throw, etc., any destructive device. Therefore, the State would presumably need only to prove that a defendant threatened to throw, etc., a destructive device, including in the future, and that the defendant's threat conveyed an intent to do bodily harm or property damage.

Additionally, the bill provides a person does not violate the prohibition against threats if the person uses or threatens to use a "firearm or any other weapon" in lawful self-defense, lawful defense of others, or lawful defense of property. This revision does not expressly include a "destructive device." Thus, for example, because the definition of "destructive device" may include items that do not appear to meet the definition of "firearm" or "weapon," the exception from violation for lawful defense of self, others, or property may not apply, depending on the item used in a given criminal case.

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<sup>28</sup> *Supra* note 26 at pp. 2-3.

Sections 2 and 3 amend s. 790.163 and s. 790.164, F.S., respectively, to make it unlawful for any person to make a false report, with intent to deceive, mislead, or misinform any person, concerning the *current* placing or planting of any bomb, etc., or concerning the *current* use of firearms in a violent manner against a person. Assuming that *current* would be construed to mean “active” situations as under the recent case law, and therefore already covered under the existing statutes, the bill appears to have little or no effect.

The bill also makes unlawful false reports concerning *future* placing or planting of any bomb, etc., or concerning *future* use of firearms in a violent manner against a person, and appears intended to overrule the recent court holding that s. 790.163, F.S., does not reach future-oriented *threats*.<sup>29</sup> Assuming the State establishes all other required elements of proof under either section,<sup>30</sup> a defendant presumably commits a violation if the defendant knew the report he or she was making was false, as is the case under current law. The result of application of the bill’s revisions in this regard is again unclear.

Section 4 of the bill amends s. 921.0222, F.S., the offense severity ranking chart of the Criminal Punishment Code to revise the description of the existing second degree felony for a violation of s. 790.162, F.S., from “Threat to throw or discharge destructive device,” to “Threat involving firearm, weapon, or destructive device.”

The bill takes effect October 1, 2020.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

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<sup>29</sup> *Emphasis added.* This holding would presumably apply to violations under the almost identical s. 790.164, F.S.

<sup>30</sup> *See supra* note 24. The bill does *not* amend s. 790.164, F.S., to insert *current or future* false reports with respect to those concerning any act of arson or other violence to property owned by the state or any political subdivision.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet reviewed this bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill amends the following sections of the Florida Statutes: 790.162, 790.163, 790.164, and 921.0022.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

The committee substitute:

- Includes as a violation of law a threat of *future* use of a firearm or any weapon if the threat is sufficient to cause alarm in a reasonable person;
- Includes the *future* throwing, projecting, placing, or discharging of any destructive device in the existing prohibition against such threats;
- Provides a person is not in violation if he or she threatens to use a firearm or any other weapon in lawful self-defense, or in lawful defense of others or of property; and
- Revises existing prohibitions against making a false report, with intent to deceive, mislead, or misinform any person, to apply to those reports concerning the *current or future* placing or planting or any bomb, dynamite, other deadly explosive, or weapon of mass destruction, or concerning the *current or future* use of firearms in a violent manner against a person.

## B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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