

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 311 Threats

SPONSOR(S): Criminal Justice Subcommittee, Massullo

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

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|---------------------|---------|--|
| 1) Criminal Justice Subcommittee | 14 Y, 0 N, As CS | DuShane | Hall |
| 2) Justice Appropriations Subcommittee | | | |
| 3) Judiciary Committee | | | |

SUMMARY ANALYSIS

A threat is a statement by which the speaker means to communicate an expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. Threats to kill or do bodily harm are not protected under the United States Constitution.

Florida law prohibits a person from willfully and unlawfully making, possessing, throwing, projecting, placing, or discharging a destructive device and assigns varying criminal penalties depending on the severity of damage or harm caused by the act. A violation of s. 790.161, F.S., is:

- Generally a third degree felony.
- A second degree felony if the act is perpetrated with intent to do bodily harm or property damage, or results in a disruption of governmental operations, commerce, or the private affairs of another person.
- A first degree felony if the act results in bodily harm to another person or in property damage.
- A capital felony if the act results in the death of another person.

Similarly, threatening to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or to do damage to the property of any person is prohibited by law. A violation of the prohibition is a second degree felony and the state does not need to prove that a person had the intent or the ability to actually carry out the threat. Rather, the threat itself must convey an intent to do bodily harm or intent to do property damage.

Under Florida law, a person is justified in threatening to use force when he or she reasonably believes that the conduct is necessary to protect himself or herself against another's unjustifiable use of force, including threatening to use force to protect a dwelling, residence, or other real property.

CS/HB 311 prohibits a person from making a threat involving a weapon or firearm if the threat is sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon. Under the bill, a person who threatens the use of a destructive device, firearm, or weapon commits a third degree felony.

The bill provides that it is not unlawful to use or threaten to use a weapon or firearm in lawful self-defense, lawful defense of others, or lawful defense of property.

The bill conforms the Criminal Punishment Code offense severity ranking chart to include threats involving a weapon or firearm as a third degree felony.

The Criminal Justice Impact Conference reviewed the bill on January 27, 2020, and estimated it would have a positive insignificant impact, meaning the bill may result in an increase of 10 or fewer prison beds.

The bill provides an effective date of October 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Criminal Threats

A threat is a statement by which the speaker means to communicate an expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.¹ The speaker must intentionally or knowingly communicate the threat and the listener must have a reasonable fear that the speaker intends to carry out the threat.² Threats to kill or do bodily harm are not protected under the United States Constitution.³

Making, Possessing, Throwing, Projecting, Placing, or Discharging Any Destructive Device

Florida law prohibits a person from willfully⁴ and unlawfully making, possessing, throwing, projecting, placing, or discharging a destructive device⁵ and assigns varying criminal penalties depending on the severity of damage or harm caused by the act. A violation of s. 790.161, F.S., is:

- Generally a third degree felony⁶.
- A second degree felony if the act is perpetrated with the intent to do bodily harm or property damage, or results in a disruption of governmental operations, commerce, or the private affairs of another person.⁷
- A first degree felony if the act results in bodily harm to another person or in property damage.⁸
- A capital felony if the act results in the death of another person.⁹

To prove that a person possessed a destructive device in violation of s. 790.161, F.S., the state must prove beyond a reasonable doubt that the defendant knew of the existence of the destructive device and intentionally exercised control over it.¹⁰ Section 790.161, F.S., requires that the offender possess the destructive device with the intent to do bodily harm or damage to property.¹¹

Threatening to Throw, Project, Place, or Discharge Any Destructive Device

¹ *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

² *Planned Parenthood v. ACLA*, 290 F.3d 1058, 1076-77 (9th Cir. 2002) (holding that a true threat is “a statement which, in the entire context and under all the circumstances, a reasonable person would foresee the statement would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.”).

³ *Saidi v. State*, 845 So. 2d 1022, 1026 (Fla. 5th DCA 2003) citing *United States v. Hutson*, 843 F.2d 1232 (9th Cir. 1988).

⁴ "Willfully" means intentionally, knowingly, and purposely. *In re Standard Jury Instruction in Criminal Cases*, 10.7 (Fla. 2019).

⁵ "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; 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." The term 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 automatic rifle (other than a short-barreled rifle) generally suitable for big game hunting. S. 790.001(4), F.S.

⁶ S. 775.082(4)(e), F.S. A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082, F.S. and 775.083, F.S.

⁷ S. 790.161(2), F.S. A second degree felony is punishable by a term of imprisonment not exceeding 15 years and up to a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

⁸ S. 790.161(3), F.S. A first degree felony is punishable by a term of imprisonment not exceeding thirty years and up to a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

⁹ S. 790.161(4), F.S. A capital felony is punishable by life imprisonment or death. S. 775.082(1), F.S.

¹⁰ *In re Standard Jury Instruction in Criminal Cases*, 10.7 (Fla. 2017).

¹¹ *Reid v. State*, 405 So. 2d 500, 501 (Fla. 2d DCA 1981).

Similarly, a person who threatens to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or to do damage to any property of any person¹² commits a second degree felony. To prove an offense, the state is not required to show the defendant had the specific intent or the ability to carry out the threat.¹³ Rather, the state must prove that the threat itself conveyed an intent to do bodily harm or to do damage, regardless of the speaker's actual intent or ability to carry out the threatened action.¹⁴ Further, the state does not have to prove the existence of an actual destructive device.¹⁵ As long as the state proves that the defendant threatened to throw, project, place, or discharge a destructive device, whether he or she has the actual ability to carry out the threat, it has met its burden.¹⁶ While s. 790.162, F.S., prohibits threats with a destructive device, the term does not encompass firearms¹⁷, and as such the prohibition does not apply to a threat concerning a weapon¹⁸ or firearm.^{19, 20}

Written Threats

In addition to verbal threats, Florida law also prohibits specified written threats. Under s. 836.10, F.S., it is a second degree felony to:

- Write or compose and send a letter, inscribed communication, or electronic communication to any person containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or a threat to kill or do bodily injury to any family member of the person to whom such letter or communication is sent; or
- Make, post, or transmit a threat in a writing or other record, including a threat to commit a mass shooting or an act of terrorism, in any manner that would allow another person to view the threat.²¹

For a written threat to be considered "sent", the communication must be deposited in the mail or by some other form of delivery, and be received by the person being threatened or by a family member of the person being threatened.²²

Threats with a Firearm

While existing Florida laws prohibit specified threats with a destructive device and written threats to kill or commit a mass shooting or an act of terrorism, no existing law prohibits a person from verbally threatening another to do bodily harm or property damage with a firearm or weapon. In August 2019, multiple bailiffs overheard a Floral City man returning from a court appearance threaten to "shoot up" a local primary school.²³ Authorities later discovered he had made similar threats during a recorded jail

¹² S. 790.162, F.S., applies to spoken threats.

¹³ *Reid v. State*, 405 So. 2d 500, 501 (Fla. 2d DCA 1981); *In re Standard Jury Instructions in Criminal Cases*, 10.8 (Fla. 2017).

¹⁴ *Id.*

¹⁵ *Valdes v. State*, 443 So. 2d 221, 222 (Fla. 1st DCA 1983).

¹⁶ *Id.*

¹⁷ 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. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime." S. 790.001(6), F.S.

¹⁸ 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." S. 790.001(13), F.S. An object qualifies as a weapon only if it is one of the objects listed in s. 790.001(13), F.S. *Streetman v. State*, 455 So. 2d 1080, 1082 (Fla. 2d DCA 1984). In interpreting what is considered a "deadly weapon" under s. 790.001(13), F.S., a deadly weapon is considered to be "any instrument that, when used in the ordinary manner contemplated by its design and construction, will or is likely to cause death or great bodily harm." *Depasquale v. State*, 438 So. 2d 159, 160 (Fla. 2d DCA 1983).

¹⁹ *L.C. v. State*, 283 So. 3d 442, 444 (Fla. 2d DCA 2019) (holding that a threat to shoot and cause harm is not prohibited by s. 790.162, F.S.).

²⁰ *Id.* As the legislature omitted firearms from s. 790.162, F.S., the court should not read into s. 790.162, F.S., to find a meaning from which a term has been excluded.

²¹ S. 836.10, F.S.

²² *O'Leary v. State*, 109 So. 3d 874, 876 (Fla. 1st DCA 2013).

²³ Buster Thompson, *Floral City man who made threats to 'shoot up' Inverness Primary School won't be prosecuted for them, but remains jailed on other charges*, Citrus County Chronicle (Aug. 16, 2019), https://www.chronicleonline.com/news/crime_and_courts/floral-city-man-who-made-threats-to-shoot-up-inverness/article_753668aa-c036-11e9-ae89-3bc3bf0e13df.html (last visited Feb. 4, 2020).

phone call. Despite having witnesses to and recordings of the verbal threats, the local State Attorney's Office determined the threats did not meet the elements required to charge the man with any crime.²⁴

Recognizing that such threats are not prohibited under Florida law, in its November 2019 report, the Marjory Stoneman Douglas Public Safety Commission recommended the Legislature consider creating a crime making it a felony to verbally threaten violence using a firearm or other deadly weapon.²⁵

Justifiable Use or Threat to Use Force

Chapter 776, F.S., provides that a person is justified in using or threatening to use force, except deadly force, in the following circumstances:

- When a person reasonably believes that such conduct is necessary to defend himself or herself against another's imminent use of unlawful force.²⁶
- When a person in a dwelling or residence, in which he or she has the lawful right to be, believes such conduct is necessary to defend himself or herself against another's imminent use of unlawful force or threat to use deadly force.²⁷
- When a person reasonably believes such conduct is necessary to prevent or terminate another's trespass on, or other tortious or criminal interference with:
 - Real property lawfully in his or her possession;
 - Real property in the possession of another who is a member of his or her immediate family or household; or
 - Real property of a person that he or she has a legal duty to protect.²⁸

Criminal Punishment Code - Offense Severity Ranking Chart

Felony offenses subject to the Criminal Punishment Code²⁹ are listed in a single offense severity ranking chart, which uses 10 offense levels to rank felonies from least severe (level 1) to most severe (level 10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute.³⁰ A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense.³¹ A person may also accumulate points for factors such as victim injury, violating a community sanction, and certain sentencing multipliers.³² The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.³³

Threatening to throw, project, place, or discharge any destructive device under s. 790.162, F.S., is currently ranked as a level five offense on the offense severity ranking chart.

Effect of Proposed Changes

CS/HB 311 prohibits a person from making a threat involving a weapon or firearm if the threat is sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon. Under

²⁴ *Id.*

²⁵ Marjory Stoneman Douglas High School Public Safety Commission, *Report Submitted to the Governor, Speaker of the House of Representatives, and Senate President*, fdle.state.fl.us/MSDHS/MSD-Report-2-Public-Version.pdf (last visited Feb. 4, 2020).

²⁶ S. 776.012(1), F.S.

²⁷ S. 776.013(1), F.S.

²⁸ S. 776.031(1), F.S.

²⁹ All felony offenses, other than capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

³⁰ S. 921.0022, F.S.

³¹ Ss. 921.0022 and 921.0024, F.S.

³² S. 921.0024(2), F.S.

³³ *Id.*

the bill, a person who threatens the use of a destructive device, firearm, or weapon commits a third degree felony. A weapon is limited to its definition in s. 790.001, F.S.

If current case law interpreting s. 790.162, F.S., applies to the newly created offense, the state must prove that a person threatened to carry out an act involving a weapon or firearm and that the threat conveyed an intent to do bodily harm or to damage property. The state would not need to prove the existence of an actual firearm or weapon, nor a person's actual intent or ability to carry out the threat.

The bill provides that it is not unlawful for a person to use or threaten to use a weapon or firearm in lawful self-defense, lawful defense of others, or lawful defense of property.

The bill conforms the Criminal Punishment Code offense severity ranking chart to include threats involving a firearm or weapon in the description of s. 790.162, F.S. Threats involving a firearm or weapon will be ranked as a third degree felony level five offense on the offense severity ranking chart. The bill also reduces the penalty for threats to throw or discharge a destructive device from a second degree felony to a third degree felony.

The bill provides an effective date of October 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 790.162, F.S., relating to threat to throw, project, place, or discharge any destructive device; felony.

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

Section 3: Provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference considered the bill on January 27, 2020, and determined it will likely have a positive insignificant impact, meaning it will result in an increase of 10 or fewer prison beds.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 3, 2020, the Criminal Justice Subcommittee adopted an amendment, and reported the bill favorably as a committee substitute. The amendment:

- Decreased the penalty for threatening to use a destructive device, weapon, or firearm from a second degree felony to a third degree felony.
- Limited the scope of what is considered a “weapon” to the definition in s. 790.001, F.S.
- Required that a threat to use a firearm or weapon be sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon.
- Provided that a person who threatens to use a firearm or any other weapon in lawful self-defense, lawful defense of others, or lawful defense of property does not commit the crime.
- Updated the offense severity ranking chart to reflect the decrease in penalty for threats made with a destructive device, weapon, or firearm.

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