

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 Appropriations

BILL: CS/CS/SB 728

INTRODUCER: Criminal Justice Committee; Infrastructure and Security Committee; and Senators Stargel and Hutson

SUBJECT: Threats

DATE: March 2, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Price</u>	<u>Miller</u>	<u>IS</u>	<u>Fav/CS</u>
2.	<u>Cellon</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
3.	<u>Forbes</u>	<u>Kynoch</u>	<u>AP</u>	<u>Favorable</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 728 amends section 790.162, Florida Statutes, to prohibit threatening to use a firearm or weapon at certain locations with intent to do bodily harm to any person or to do damage to any of the designated properties, if the threat is sufficient to cause alarm in a reasonable person. The crime is punishable as a third degree felony. The bill also amends the current degree of the offense of threatening 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 from a second degree felony to a third degree felony.

The bill provides that a person is not in violation of the new law prohibiting threatening to use a firearm or weapon at certain locations if he or she uses or threatens to use a firearm or any other weapon in lawful self-defense, lawful defense of others, or lawful defense of property.

The Criminal Punishment Code offense severity ranking chart is amended to include the new crime of threatening 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, if the threat is sufficient to cause alarm in a reasonable person as a Level 5 and to incorporate changes made by the bill.

The Criminal Justice Impact Conference considered the previous version of this bill (CS/SB 728) on January 27, 2020, and determined that it would have a positive insignificant prison bed impact (an increase of 10 or fewer prison beds). See Section V.

The bill takes effect October 1, 2020.

II. Present Situation:

Definitions

Chapter 790, F.S., relating to weapons and firearms 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;¹ 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.²
- “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.³
- “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.⁴

¹ 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).

² Section 790.001(4), F.S. The term under Florida law does not include a device which is not designed, redesigned, used, or intended for use as a weapon; any destructive 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.

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

⁴ Section 790.001(13), F.S.

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. A violation is a second degree felony, punishable by an imprisonment term not exceeding 15 years and up to a \$10,000 fine.⁵

The courts have construed s. 790.162, F.S., determining that whether an offender intended to carry out a threat is irrelevant,⁶ and there need not be proof that an actual destructive device existed.⁷

Criminal Punishment Code

The Criminal Punishment Code (Code) is Florida's primary sentencing policy.⁸ Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).⁹ Points are assigned and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the offense level escalates. Points may also be added or multiplied for other factors such as victim injury or the commission of certain offenses like a Level 7 or 8 drug trafficking offense. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.¹⁰ Absent mitigation,¹¹ the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.

III. Effect of Proposed Changes:

The bill amends s. 790.162, F.S., to expand that section's applicability to include threats involving the use of a firearm or any weapon.

Specifically, the bill makes it a third degree felony¹² for any person to threaten the use of a firearm or any weapon at a child care facility as defined in s. 402.302, F.S., a school as defined

⁵ Sections 775.082, and 775.083, F.S.

⁶ "[T]he 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." *Reid v. State*, 405 So.2d 500, 501 (Fla. 2d DCA 1981).

⁷ "[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." *Valdes v. State*, 443 So.2d 221, 222 (Fla. 1st DCA 1983).

⁸ Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

⁹ Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

¹⁰ Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

¹¹ The court may "mitigate" or "depart downward" from the scored lowest permissible sentence if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

¹² A third degree felony is punishable by up to 5 years' imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

in s. 790.115(2)(a), F.S., a religious institution as defined in s. 496.404(23), F.S., a theme park complex as defined in s. 817.361(1)(c), F.S., or any building owned by a federal, state, county, municipality, or other local government or political subdivision, with intent to do bodily harm to any person or with intent to do damage to any of the designated properties, if the threat is sufficient to cause alarm in a reasonable person.

The bill provides that a person does not violate the prohibition against threatening to use a firearm or any weapon 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.

The bill also changes the felony degree of the offense of threatening 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 from a second degree felony to a third degree felony.

The bill amends s. 921.0222, F.S., the offense severity ranking chart of the Criminal Punishment Code to revise the degree of crime for the violation of s. 790.162(1), F.S., as amended, from a second to a third degree felony. This is the crime of threatening 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.

The bill also adds the crime of threat involving a firearm or weapon as a Level 5 to the Criminal Punishment Code offense severity ranking chart.

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 identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference which provides the final, official estimate of the prison bed impact, if any, considered the previous version of this bill (CS/SB 728) on January 27, 2020, and determined that it would have a positive insignificant prison bed impact (an increase of 10 or fewer prison beds).

According to the Department of Corrections (DOC), there have only been an average of 4 probation and 3 prison admissions for this offense over the past 3 years. However, for a similar offense of Aggravated Assault with a Weapon, there have been an average of 1,048 probation admissions and 483 prison admissions over the past 3 years. The impact of adding the elements of firearms and weapons to this section is unknown, because currently these offenses would probably be captured in another offense such as Aggravated Assault with a Weapon, therefore the impact is indeterminate.¹³

The Public Defender Association, Inc. indicates the bill would have an indeterminate effect on public defender caseloads. The Association also notes that it is difficult to project how many cases would be filed under the new felony created in s. 790.162, F.S.¹⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:**Threats**

The First Amendment to the U.S. Constitution does not protect “true threats” as free speech and states are not restricted from banning such threats.¹⁵ The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”¹⁶

¹³ The Department of Corrections, *2020 Agency Legislative Bill Analysis* for SB 728, (January 24, 2020), p. 2 (on file with the Senate Committee on Appropriations).

¹⁴ Florida Public Defender Association, Inc., *Fiscal Analysis of SB 728* (on file with the Senate Committee on Appropriations).

¹⁵ *Virginia v. Black*, 538 U.S. 343, 344 (2003) quoting *Watts v. United States*, 394 U.S. 705, 708 (1969).

¹⁶ *Id.*; see also *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992).

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 790.162 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.)

CS/CS by Criminal Justice on February 4, 2020:

The committee substitute:

- Renumbers and reorganizes subsections in s. 790.162, F.S.
- Deletes the reference to the *future* throwing, projecting, placing, or discharging of any destructive device in s. 790.162, F.S.
- Deletes provisions related to the *future* threat to use a firearm or any weapon in s. 790.162, F.S.
- Changes the felony degree of the crime of threatening 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 to a third degree felony from a second degree felony and makes the corresponding changes in the Criminal Punishment Code offense severity ranking chart.
- Limits the application of s. 790.162(2), F.S., to the following locations:
 - A child care facility as defined in s. 402.302, F.S.;
 - A school as defined in s. 790.115(2)(a), F.S.;
 - A religious institution as defined in s. 496.404(23), F.S.;
 - A theme park complex as defined in s. 817.361(1)(c), F.S.; or
 - Any building owned by a federal, state, county, municipality, or other local government or political subdivision.
- Deletes sections 2 and 3 from the CS, which removes the provisions related to *current or future false reports* regarding the placing or planting of any bomb, dynamite, other deadly explosive, or weapon of mass destruction (s. 790.163, F.S.) and the use of firearms in a violent manner against a person (s. 790.164, F.S.).

CS by Infrastructure and Security on January 13, 2020:

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 of 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.

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