

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 Criminal Justice

BILL: CS/SB 728

INTRODUCER: Infrastructure and Security Committee and Senator Stargel

SUBJECT: Threats

DATE: January 27, 2020

REVISED: 02/03/20

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Miller	IS	Fav/CS
2.	Cellon	Jones	CJ	Pre-meeting
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

Threats

CS/SB 728 amends s. 790.162, F.S., to prohibit a person from making a threat to use a firearm or weapon, including the future use of a firearm or any 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. The bill also amends s. 790.162, F.S., to prohibit a threat of future throwing, projecting, placing, or discharging of any destructive device.

The bill provides that a person is not in violation of s. 790.162, F.S., 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.

False Reports

The bill amends s. 790.163, F.S., to prohibit a person from making a false report, with intent to deceive, mislead, or misinform any person, concerning the current or future placing or planting of any bomb, dynamite, other deadly explosive, or weapon of mass destruction. The bill also amends s. 790.163, F.S., to prohibit a person from making a false report concerning the current or future use of firearms in a violent manner against a person or persons.

Likewise, the bill amends s. 790.164, F.S., which specifically addresses the same conduct as in s. 790.163, F.S., but where the false report “targets” property owned by the state or any political subdivision. The bill prohibits a person from making a false report with intent to deceive, mislead, or misinform any person, concerning the current or future placing or planting of any bomb, dynamite, other deadly explosive, or weapon of mass destruction, and the current or future use of firearms in a violent manner against a person or persons.

The Criminal Punishment Code offense severity ranking chart is amended in s. 921.0022(3)(e), F.S., to incorporate changes made by the bill. These changes do not include any adjustments to the current rankings of the offenses amended by the bill.

The Criminal Justice Impact Conference (CJIC) estimates a positive insignificant prison bed impact from this bill which means an increase of 10 or fewer prison beds. The CJIC meeting at which this bill estimate was made occurred during a meeting of the Criminal Justice Estimating Conference on January 27, 2020. See Section V. Fiscal Impact Statement.

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

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).

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

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

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,⁸ or concerning

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.

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 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. The term “explosive” is defined in s. 790.001(5), F.S., with certain listed exceptions, as “any chemical compound or mixture that has the property of yielding readily to combustion or oxidation upon application of

the use of firearms in a violent manner against a person. Section 790.164, F.S., prohibits the same false reports where the “target” of the report is property owned by the state or any political subdivision. Section 790.164, F.S., also encompasses false reports concerning any act of arson or other violence to the property as well as the use of firearms in a violent manner against a person or persons.

Under both sections of law, a violation is a second degree felony, punishable by a term of imprisonment not exceeding 15 years and up to a \$10,000 fine.⁹

Case Law Applying Section 790.162, F.S., (Threats), Contrasting Section 790.163, F.S., (False Reports)

Since 2002, Florida courts have found that a threat to do a future action such as “blowing up” a school, does not equate to a false report, with intent to deceive, mislead, or otherwise misinform any person, concerning the planting of a bomb, dynamite, other deadly explosive, or weapon of mass destruction.

False reports of the nature found in ss. 790.163 and 790.164, F.S., read in conjunction with ss. 790.161 and 790.162, F.S., make it clear that the first two statutes punish the *acts* of committing the crimes of actually throwing, placing, or discharging bombs or other deadly explosives, attempts to do so, and *threats* to do so.¹⁰ It is equally clear that the false report statutes, ss. 790.163 and 790.164, F.S., were created to punish the classic “bomb scare” false report scenario.¹¹

Relying heavily on a Maryland court’s analysis of a similar question, the court in *D.B. v. State* determined that the defendant’s statements to school officials that he would “blow up” or “burn down” his school *at some time in the future* was *not* a violation of s. 790.163, F.S., the *false reports statute* under which D.B. was charged. “An individual may truthfully threaten to explode a bomb in a building without making a false statement. Similarly, one may transmit a false statement or rumor that there is a bomb in a building without ever threatening, or communicating an intent, to explode a bomb.”¹²

A recent case almost identical to *D.B. v. State*, involved a 12 year-old student who stated, “I’m going to shoot up the classroom, April Fools,” while in the classroom “swapping April Fools’ jokes,” with his classmates. As in *D.B. v. State*, the charge against the boy was brought under the *false reports* statute.¹³ It is entirely possible in this case that the prosecuting attorney considered charging J.A.W. under the threats statute, s. 790.162, F.S., having read the 2002 *D.B.* case and therefore knowing that the false reports statute was not the statute that fit the crime. But it would have been equally obvious to the prosecutor that there was no crime in the threats statute related

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.”

⁹ Sections 775.082 and 775.083, F.S.

¹⁰ Section 790.161, F.S., prohibits the *act* of willfully and unlawfully making, possessing, throwing, projecting, placing, or discharging a destructive device, or attempting to do those acts. Section 790.162, F.S., punishes the *threat to do the acts* prohibited in s. 790.161, F.S.

¹¹ *Grizzard v. State*, 139 So.2d 161, 162 (Fla. 2d DCA 161, 1962).

¹² *D.B. v. State*, 825 So.2d 1042 (Fla. 1st DCA, 2002) *quoting* *Moosavi v. State*, 355 Md. 651, 736 A.2d 285 (1999).

¹³ *J.A.W., A Child v. State*, 283 So.3d 896 (Fla. 1st DCA, 2019); s. 790.163, F.S.

to the use of firearms or other weapons, and the “threat” uttered by J.A.W. involved the use of a firearm to “shoot up the school.” It is, perhaps, for these reasons that J.A.W. was charged under the false reports statute which does contain a provision related to the use of firearms against another, rather than not charging him at all.¹⁴

The *J.A.W.* court’s ruling, based on its reasoning in *D.B.*, plainly stated:

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. [Citations omitted.] But the statute does not reach future-oriented threats like the one uttered by *J.A.W.* because [the] April Fools’ Day joke threatened future shooting, it was not a “false report” made with intent to deceive, mislead, or otherwise misinform for purposes of s. 790.163(1).¹⁵

III. Effect of Proposed Changes:

The bill amends s. 790.162, F.S., to expand that section’s applicability to also include threats involving the use of a firearm or any weapon, as defined under current law. The bill makes it a second degree felony for any person to threaten the use of a firearm or any weapon, including the *future* use of a firearm or any weapon if the threat is sufficient to cause alarm in a reasonable person.

The bill also adds a provision to s. 790.162, F.S., prohibiting the threat of the *future* throwing, projecting, placing, or discharging of any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person, of any destructive device.

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.

The bill also amends ss. 790.163 and 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,

¹⁴ *Id.*; See s. 790.163(1), F.S.; Note that the bill adds a threat to use a firearm or other weapon to the threats statute, s. 790.162, F.S., thereby solving what may have been the prosecutor’s dilemma under the facts of *J.A.W.*

¹⁵ *Id.*; See also *L.C. v. State*, 283 So.3d 442, 443-444 (Fla. 2nd DCA, 2019), in which the court observed: Courts must afford statutory language “its plain and ordinary meaning, giving due regard to the context within which it is used.” *Hampton v. State*, 103 So. 3d 98, 110 (Fla. 2012). A reasonable reader would understand making a report to mean providing information about something that is occurring or has already occurred, not expressing a desire or an intention to do something in the future.

concerning the *current or future* placing or planting of a bomb, an explosive, or a weapon of mass destruction, or the *current or future* use of firearms in a violent manner.¹⁶

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 identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

¹⁶ The bill does *not* specifically amend s. 790.164, F.S., to insert *current or future* false reports with respect to reports concerning any act of arson or other violence to property owned by the state or any political subdivision.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) estimates a positive insignificant prison bed impact from this bill which means an increase of 10 or fewer prison beds.¹⁷

In its analysis of the bill, the Public Defender Association, Inc., indicates that 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.¹⁸

VI. Technical Deficiencies:

Threats

Future threats to throw, project, place, or discharge any destructive device appears to already be prohibited by current s. 790.162, F.S. This is because a threat, by its definition, can only *be* a *threat of a future action*. “I am going to blow up the school” is a threat to carry out an action *in the future*.

“I am blowing up the school right now (spoken as the person throws the destructive device at the school)” indicates an action in progress at the moment and is punishable, not as a threat, but as an unlawful act in and of itself. “I blew up the school” is not a threat at all, but rather it is a statement of an unlawful act that has occurred in the past.

Therefore, because a threat can only *be* a threat of a future action, consideration should be given to removing the references to future threats in the bill language amending s. 790.162, F.S.

False Reports

Similarly, the language prohibiting a *false* report, with intent to deceive, mislead, or otherwise misinform any person, concerning the *current or future* crimes of planting a bomb, an explosive, or a weapon of mass destruction, and the use of firearms in a violent manner as set forth in ss. 790.163 and 790.165, F.S., is nonsensical.

A report about the future commission of the crimes listed in those sections can only *be false* if there is evidence that what the person reported *was* false. For example, if a person reports that a bomb has been planted at the school, law enforcement can establish if that has happened or not. If there’s no bomb found, the report was false. However, if the person reports that someone is *going to* plant a bomb at the school, or *will* plant a bomb (future action), it cannot be shown that the report is *false* because what has been reported has not *yet* occurred or may never occur.

¹⁷ The CJIC meeting at which this bill estimate was made occurred during a meeting of the Criminal Justice Estimating Conference on January 27, 2020. The meeting is available on video on the Florida Channel at <https://thefloridachannel.org/videos/1-27-20-criminal-justice-estimating-conference/> (last visited January 30, 2020).

¹⁸ Florida Public Defender Association, Inc., Fiscal Analysis of SB 728 (on file with the Senate Criminal Justice Committee).

Because a report of a *current* criminal activity of this nature can be proven to be true or false and because a report of a *future* crime of this nature cannot be shown to be false, it is suggested that the “current or future” language be removed from the bill.

VII. Related Issues:

Aggravated Assault

Section 784.021, F.S., prohibits aggravated assault with a deadly weapon. The elements of the offense are:

- The defendant intentionally and unlawfully threatened, either by word or act, to do violence to the victim;
- At the time, the defendant appeared to have the ability to carry out the threat;
- The act of the defendant created in the mind of the victim a well-founded fear that the violence was about to take place; and
- The assault was made with a deadly weapon.¹⁹

Aggravated assault with a deadly weapon is punishable as a third degree felony which could result in up to 5 years’ imprisonment and a \$5,000 fine.

Aggravated assault is somewhat similar to the new crime created by the bill in s. 790.162, F.S., which prohibits a person from threatening the use of a firearm or any weapon if the threat is sufficient to cause alarm in a reasonable person.

The main difference between the two crimes is that aggravated assault requires that the defendant appear to have the ability to carry out the threat. One could argue that the act of threatening to shoot someone *and* appearing to be able to carry out the threat (i.e., pointing a firearm at the victim) is a more dangerous crime than the new crime in s. 790.162, F.S., which has no such element. It may be incongruous to punish the less dangerous crime in s. 790.162, F.S., as a second degree felony which could result in 15 years’ imprisonment and a \$10,000 fine.

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.²⁰ 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.”²¹

VIII. Statutes Affected:

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

¹⁹ Aggravated Assault; Florida Standard Criminal Jury Instructions 8.2.

²⁰ *Virginia v. Black*, 538 U.S. 343, 344 (2003) quoting *Watts v. United States*, 394 U.S. 705, 708 (1969).

²¹ *Id.*; see also *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992).

IX. Additional Information:

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

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.