

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1281 Interception and Disclosure of Wire, Oral, or Electronic Communications

**SPONSOR(S):** Criminal Justice Subcommittee, Persons-Mulicka

**TIED BILLS:** IDEN./SIM. BILLS: SB 1618

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	18 Y, 0 N, As CS	Butcher	Hall
2) Judiciary Committee	19 Y, 0 N	Butcher	Kramer

### SUMMARY ANALYSIS

In Florida, intentionally intercepting an oral communication, commonly known as wiretapping, is generally a third degree felony, with limited exceptions. For example, it is not a crime for a person to intercept an oral communication if:

- All parties to the communication consent to the interception.
- The person is a law enforcement officer or a person acting under the direction of a law enforcement officer and:
  - He or she is a party to the communication; and
  - One of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.
- The person is a child under 18 years of age and:
  - He or she is a party to the communication; and
  - Has reasonable grounds to believe the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or act of physical force or violence against the child.
- The person is protected under an active temporary or final injunction for repeat violence, sexual violence, or dating violence under s. 784.046, F.S.; stalking under s. 784.0485, F.S.; domestic violence under s. 741.30, F.S.; or any other court-imposed prohibition of conduct toward the person, and the communication is in violation of such injunction or court order.

CS/HB 1281 amends s. 934.03, F.S., to expand the limited exceptions under which a person may lawfully intercept a communication. The bill authorizes a person to intercept an oral communication if:

- The person is a parent or legal guardian of a child under 18 years of age and:
  - The child is a party to the communication; and
  - The parent or legal guardian has reasonable grounds to believe the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.
- The person is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful act of domestic violence under s. 741.28, F.S., or repeat violence, sexual violence, or dating violence under s. 784.046, F.S., against the party intercepting and recording the communication.

The bill may have an indeterminate positive impact on the jail and prison bed population by exempting the recording of specified communications from the prohibition against wiretapping, and authorizing a private citizen to collect admissible evidence for specified criminal offenses, which may make it easier to prove a violation of such offenses.

The bill provides an effective date upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Wiretapping

In Florida, intentionally intercepting<sup>1</sup> an oral communication,<sup>2</sup> commonly known as wiretapping, is generally a third degree felony,<sup>3</sup> with limited exceptions. For example, it is not a crime for a person to intercept an oral communication if:

- All parties to the communication consent to the interception.<sup>4</sup>
- The person is a law enforcement officer or a person acting under the direction of a law enforcement officer and:
  - He or she is a party to the communication; and
  - One of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.<sup>5</sup>
- The person is a child under 18 years of age and:
  - He or she is a party to the communication; and
  - Has reasonable grounds to believe the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or act of physical force or violence against the child.<sup>6, 7</sup>
- The person is protected under an active temporary or final injunction for repeat violence, sexual violence, or dating violence under s. 784.046, F.S.; stalking under s. 784.0485, F.S.; domestic violence under s. 741.30, F.S.; or any other court-imposed prohibition of conduct toward the person, and the communication is in violation of such injunction or court order.<sup>8,9</sup>

The penalty for wiretapping may be decreased to a misdemeanor<sup>10</sup> under the following circumstances:

- The person has no prior wiretapping offenses;
- The wiretapping was not done for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; and
- The intercepted communication was a radio communication that was not scrambled, encrypted, or transmitted using modulation techniques intended to preserve the privacy of such communication.<sup>11</sup>

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<sup>1</sup> "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. S. 934.02(3), F.S.

<sup>2</sup> "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication. S. 934.02(2), F.S.

<sup>3</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

<sup>4</sup> Section 934.03(2)(d), F.S. Thirteen states, in some form, require the consent of all parties involved in a conversation or phone call before the conversation can be recorded. These laws are sometimes referred to as "two-party" consent laws but, technically, require that all parties to a conversation must give consent before the conversation can be recorded. Recording Law, *All Party (Two Party) Consent States*, <https://recordinglaw.com/united-states-recording-laws/> (last visited Feb. 7, 2024).

<sup>5</sup> S. 934.03(2)(c), F.S.

<sup>6</sup> S. 934.03(2)(k), F.S.

<sup>7</sup> The Legislature provided that such recording is lawful in 2015, following the ruling in *McDade v. State*, 154 So.3d 292 (Fla. 2014). See Ch. 2015-82, Laws of Fla.

<sup>8</sup> S. 934.03(2)(l), F.S. A recording authorized under this paragraph may be provided to a law enforcement agency, an attorney, or a court for the purpose of evidencing a violation of an injunction or court order if the subject of the injunction or court order prohibiting contact has been served the injunction or is on notice that the conduct is prohibited. A recording authorized under this paragraph may not be otherwise disseminated or shared.

<sup>9</sup> The Legislature passed this exception in 2021. See Ch. 2021-207, Laws of Fla.

<sup>10</sup> Misdemeanors are classified as either first- or second-degree. A first degree misdemeanor is punishable by up to one year in the county jail and a \$1,000 fine. A second degree misdemeanor is punishable by up to 60 days in the county jail and a \$500 fine. Ss. 775.082 and 775.083, F.S.

<sup>11</sup> S. 934.03(4), F.S.

An oral communication that is intercepted illegally cannot be used as evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority or political subdivision of the state.<sup>12</sup> When a communication has been unlawfully intercepted, an aggrieved party may move to suppress the contents of the interception or any evidence derived from it.<sup>13</sup> However, not all wiretapping is subject to exclusion. Florida only protects oral communications by a person exhibiting an expectation of privacy under circumstances reasonably justifying their expectation of privacy.<sup>14</sup> At least one Florida court has held that “it may well be that a compelling case can be made for an exception from chapter 934’s statutory exclusionary rule for recordings that provide evidence of criminal activity – or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature.”<sup>15</sup>

### Domestic Violence

Under s. 741.28, F.S., “domestic violence” means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.<sup>16</sup>

### Repeat Violence, Sexual Violence, or Dating Violence

Section 784.046, F.S., creates a cause of action for an injunction for protection in cases of repeat violence, sexual violence, or dating violence, and defines relevant terms including:

- “Repeat violence” means two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner’s immediate family member.
- “Sexual violence” means any one incident of:
  - Sexual battery, as defined in chapter 794, F.S.;
  - A lewd or lascivious act, as defined in chapter 800, F.S., committed upon or in the presence of a person younger than 16 years of age;
  - Luring or enticing a child, as described in chapter 787, F.S.;
  - Sexual performance by a child, as described in chapter 827, F.S.; or
  - Any other forcible felony wherein a sexual act is committed or attempted, regardless of whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney.
- “Dating violence” means violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature.<sup>17</sup>

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<sup>12</sup> S. 934.06, F.S.

<sup>13</sup> Ss. 934.06 and 934.09(10)(a), F.S.

<sup>14</sup> A person must show that they have a reasonable expectation of privacy under the circumstances, which “depends on one’s actual subjective expectation of privacy as well as whether society is prepared to recognize that expectation as reasonable.” *State v. Inciarrano*, 473 So.2d 1272, 1275 (Fla. 1985) (holding that the defendant’s subjective expectation of privacy, under the circumstances was not justified, because he “went to the victim’s office with the intent to do him harm. He did not go as a patient. The district court, in the present case, correctly stated: One who enters the business premises of another for a lawful purpose is an invitee. At the moment that his intention changes, that is, if he suddenly decides to steal or pillage, or murder, or rape, then at that moment he becomes a trespasser and has no further right upon the premises. Thus, here, if appellant ever had a privilege, it dissolved in the sound of gunfire.”).

<sup>15</sup> *McDade v. State*, 154 So.3d 292 (Fla. 2014).

<sup>16</sup> “Family or household member” means spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are parents of a child in common regardless of whether they have been married. With the exception of persons who have a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit. S. 741.28(3), F.S.

<sup>17</sup> The existence of such a relationship shall be determined based on the consideration of the following factors: 1) a dating relationship must have existed within the past 6 months; 2) the nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and 3) the frequency and type of interaction between the persons involved in the relationship must have included that the persons have been involved over time and on a continuous basis during the course of the relationship. Dating violence does not include violence in a casual acquaintanceship or violence between individuals who only have engaged in ordinary fraternization in a business or social context. s. 784.046(1)(d), F.S.

## Effect of Proposed Changes

CS/HB 1281 amends s. 934.03, F.S., to expand the limited exceptions under which a person may lawfully intercept a communication.

### Parent or Legal Guardian Exception

The bill authorizes a person to intercept an oral communication if:

- The person is a parent or legal guardian of a child under 18 years of age and:
  - The child is a party to the communication; and
  - The parent or legal guardian has reasonable grounds to believe the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.

A recording authorized under this section and which captures a statement by a party that the party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against a child *must* be provided to a law enforcement agency and may be used for the purpose of evidencing the intent to commit or the commission of an unlawful sexual act or an unlawful act of physical force or violence against a child, but may not be otherwise disseminated or shared.<sup>18</sup>

### Domestic Violence, Repeat Violence, Sexual Violence, or Dating Violence Exception

The bill authorizes a person to intercept an oral communication if:

- The person is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful act of domestic violence under s. 741.28, F.S., or repeat violence, sexual violence, or dating violence under s. 784.046, F.S., against the party intercepting and recording the communication.

A recording authorized under this section may be provided to a law enforcement agency, an attorney, or a court for the purpose of evidencing that a specified crime has been committed, but may not be otherwise disseminated or shared.

The bill provides an effective date upon becoming a law.

## B. SECTION DIRECTORY:

**Section 1:** Amends s. 934.03, F.S., relating to interception and disclosure of wire, oral, or electronic communications prohibited.

**Section 2:** Provides an effective date upon becoming a law.

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<sup>18</sup> Under s. 39.201, F.S., a person is required to report immediately to the central abuse hotline established in s. 39.101, in writing, through a call to the toll-free telephone number, or through electronic reporting, if he or she knows, or has reasonable cause to suspect, that any of the following has occurred: a) child abuse, abandonment, or neglect by a parent or caregiver, which includes, but is not limited to, when a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare or when a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide such supervision and care; or b) child abuse by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare. The central abuse hotline must immediately electronically transfer such reports to the appropriate county sheriff's office. Additionally, any person who knows, or has reasonable cause to suspect, that a child is the victim of sexual abuse or juvenile sexual abuse shall report such knowledge or suspicion to the central abuse hotline, including if the alleged incident involves a child who is in the custody of or under the protective supervision of the department.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

The bill may have an indeterminate positive impact on the jail and prison bed population by exempting the recording of specified communications from the prohibition against wiretapping, and authorizing a private citizen to collect admissible evidence for specified criminal offenses, which may make it easier to prove a violation of such offenses.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 25, 2024, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment corrected a statutory cross-reference.

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