SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 80-B

SPONSOR: Committee on Criminal Justice and Senators Brown-Waite and Smith

SUBJECT: Interception of Communications

DATE: October 24, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 80-B amends s. 934.07, F.S., to provide that the Governor, the Attorney General, the Statewide Prosecutor, or any State Attorney may authorize an application to a judge of competent jurisdiction for the interception of wire, oral, or electronic communication by the Department of Law Enforcement for the investigation of the offense when such interception may provide or has provided evidence of the commission of any offense that may be an act of terrorism or in furtherance of an act of terrorism or evidence of any conspiracy to commit any such violation.

The CS also amends s. 934.09, F.S., to provide an additional exemption from the requirement that an application for an intercept identify the facilities from which, or the place where, the communication is to be intercepted. This exemption is that the person whose communications are to be intercepted has removed, or is likely to remove, himself or herself to another judicial circuit within the state.

The CS also provides that, limited to investigations of acts of terrorism, the court may authorize continued interception within this state, both within and outside its jurisdiction, if the original interception occurred within its jurisdiction.

This CS substantially amends the following sections of the Florida Statutes: 934.07 and 934.09.

II. Present Situation:

A. Section 934.07

Section 934.07, F.S., provides that the Governor, the Attorney General, the Statewide Prosecutor, or any State Attorney may authorize an application to a judge of competent jurisdiction for an order authorizing the interception of wire, oral, or electronic communications by the Department of Law Enforcement or any law enforcement agency (as defined in s. 934.02, F.S.) having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of the commission of the following offenses: murder, kidnapping, arson, gambling, robbery, burglary, theft, dealing in stolen property, criminal usury, bribery, or extortion; any violation of chapter 893, F.S.; any violation of the provisions of the Florida Anti-Fencing Act; any violation of chapter 895, F.S.; any violation of chapter 896, F.S.; any violation of chapter 815, F.S.; any violation of chapter 847, F.S.; any violation of s. 827.071, F.S.; any violation of s. 944.40, F.S.; or any conspiracy to commit any violation of the laws of this state relating to such offenses.

B. Section 934.09

Section 934.09(1), F.S., provides that each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under ss. 934.03-934.09, F.S., shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Among the information the statute specifies must be included is a particular description of the nature and location of the facilities from which, or the place where, the communications are to be intercepted. s. 934.09(1)(b), F.S. Subsection (11) contains exemptions to this requirement. *Id*.

Section 934.09(3), F.S., provides that upon application for an interception, the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting, and outside such jurisdiction but within the State of Florida in the case of a mobile interception device authorized by the judge within such jurisdiction, if the judge determines on the basis of the facts submitted by the applicant that:
(a) There is probable cause for belief that an individual is committing, has committed, or is about to commit an offense as provided in s. 934.07, F.S.
(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception.
(c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.
(d) Except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

Section 934.09, F.S., provides that the requirements of subparagraph (1)(b)2. and paragraph (3)(d) of that statute relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if:

(a) In the case of an application with respect to the interception of an oral communication:
1. The application is by an agent or officer of a law enforcement agency and is approved by the Governor, the Attorney General, the statewide prosecutor, or a state attorney.
2. The application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted.
3. The judge finds that such specification is not practical.
(b) In the case of an application with respect to a wire or electronic communication:
1. The application is by an agent or officer of a law enforcement agency and is approved by the Governor, the Attorney General, the statewide prosecutor, or a state attorney.
2. The application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility.
3. The judge finds that such showing has been adequately made.
4. The order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably proximate to the instrument through which such communication will be or was transmitted.

Subsection (11) does not presently address as an exemption the situation where the person whose communications are to be intercepted has removed himself or herself to another judicial circuit within the state.

Florida Statutory law does not specifically address whether a court authorizing an original intercept can authorize continued interception when the person whose communication is subject to interception leaves the jurisdiction of the court. This issue is important because criminals frequently relocate or are otherwise on the move, such as terrorists.

C. State v. McCormick

A case of relevance to the subject of multijurisdictional intercept orders is *State v. McCormick*, 719 So.2d 1220 (Fla. 5th DCA 1998). The facts relevant to *McCormick* were that a detective with the Melbourne Police Department filed an application and affidavit with the circuit court for the interception and recording of wire or oral communications on a cellular telephone number, mobile in nature, and subscribed to within Brevard County, Florida. The application also identified the telephone number by the name of its subscriber and listed two persons as the targets of the investigation, who resided on Merritt Island. The application alleged that the cellular telephone was being used by one of the persons on Merritt Island to arrange drug deals.

The circuit court entered an order authorizing the interception and recording of conversations on the cellular telephone. On authority of that order, conversations were intercepted and recorded by the Melbourne Police Department, leading to cannabis trafficking and conspiracy charges being filed against the persons mentioned in the original application and the Appellees in the McCormick appeal. The Appellees moved to suppress the wiretap evidence. The circuit court found merit in Appellees' argument that the Melbourne Police Department detective lacked

jurisdiction to seek, receive, and execute the wiretap authorization order, and suppressed the evidence. The State appealed this suppression order to the Fifth District.

The Fifth Circuit identified as the State's main issue on appeal its contention that the circuit court erroneously concluded that the Melbourne Police Department Detective lacked the authority to execute the order involving a cellular phone whose subscriber resided in Merritt Island. The Court noted that the "parties seem to be in agreement that the [detective's] . . . authority depends on where the 'interception' of a phone call is deemed to take place. 'Intercept' is defined in the wiretap statute as '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), Fla. Stat. (1997). The State notes that no Florida court has ruled on the question of where an 'interception' occurs for jurisdictional purposes where a cellular telephone is involved, and further notes that 'a cellular telephone is mobile in nature and can be repeatedly carried across various jurisdictional lines.'" *Id.* at 1221-1222.

The Fifth Circuit agreed with the State's argument ". . . that the 'interception' of a cellular call occurs both at the location of the tapped telephone and at the site where law enforcement authorities hear and record the call, and therefore the wiretap was proper here where the listening post was located in Melbourne." *Id.* The Court then expanded on the authority supporting this argument:

> . . . This is the approach adopted by numerous courts faced with similar jurisdictional issues. See *United States v. Ramirez*, 112 F.3d 849, 852 (7th Cir.1997) (upholding authority of Wisconsin federal court to issue wiretap order on cellular phone where phone and listening post were in Minnesota; discussing mobility of cellular phone and noting that "interception takes place both where the phone is located (including, we suppose, although we can find no cases, where the receiving phone is located) and where the scanner used to make the interception is located"), *cert. denied*, --- U.S. ----, 118 S.Ct. 232, 139 L.Ed.2d 163 (1997); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir.1992) (upholding wiretap in New York of telephones in New Jersey, noting that "a communication is intercepted not only where the tapped telephone is located, but also where the contents of the redirected are first to be heard"); *United States v. Burford*, 755 F.Supp. 607, 611 (S.D.N.Y.1991) (approving authority of New York federal court to authorize tap of telephones in Brooklyn and Maryland, noting that conversations "began in Maryland and were aurally acquired, or seized, in New York"); *Evans v. State*, 252 Ga. 312, 314 S.E.2d 421 (1984) (approving authority of Fulton County district attorney to apply, and Fulton Superior Court judge to issue, wiretap warrant on phones outside of county where listening post was within county).
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> In so holding, we reject Appellees' contention that our interpretation is foreclosed by the decision in *State v. Mozo*, 655 So.2d 1115, 1117 (Fla.1995), wherein the supreme court stated that under the Florida wiretap statute "[t]he actual 'interception' of a communication occurs not where such is ultimately heard or recorded but where the communication originates." In *Mozo*, the court was addressing the issue of whether a citizen has privacy expectation in a cordless phone conversation. The police had, without a wiretap order, monitored cordless telephone calls from an apartment complex using a scanner. The defendants moved to suppress the evidence obtained via the scanner,

> claiming a right to privacy to cordless phone conversations in their home. The supreme court held that the defendants did have a privacy right in the conversation and made the statement quoted above regarding the location of "interception" in order to make the point about the conversation occurring in the home.
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> We agree with the State that *Mozo* should be limited to its facts; the court was discussing the right to privacy rather than the issue of jurisdiction. *But cf. Koch v. Kimball*, 710 So.2d 5 (Fla. 2d DCA 1998) (relying on *Mozo* in holding that interception occurred where communication originated rather than where ultimately heard for purposes of exercising long-arm jurisdiction over Georgia resident who recorded call made from Tampa). Moreover, the *Mozo* court relied on *United States v. Nelson*, 837 F.2d 1519, 1527 (11th Cir.1988), where the court stated that "the term 'intercept' as it relates to 'aural acquisitions' refers to the place where a communication is initially obtained regardless of where the communication is ultimately heard." The *Nelson* court did not exclude the scanner location from the definition of "interception"; rather, it only held that the origination point was definitely included. Other courts interpreting *Nelson* have found it not inconsistent with *Rodriguez*. *See, e.g., United States v. Denman*, 100 F.3d 399, 403 (5th Cir.1996) (noting that in *Nelson* "the court did not rule out the possibility that the initial listening to the recording by the intercepting agent might also be considered part of the interception"), *cert. denied*, 520 U.S. 1121, 117 S.Ct. 1256, 137 L.Ed.2d 336 (1997); *accord United States v. Tavarez*, 40 F.3d 1136, 1138 n. 1 (10th Cir.1994).
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> In sum, we find that [the detective] . . . had authority to seek and execute the wiretap order since the listening post was located in Melbourne, and therefore the interception of the cellular telephone calls occurred there. We note that this case involves new and evolving areas of both law and technology, and our conclusion here, in accord with that of other courts that have faced this issue, is a logical solution to the problems created by the mobility of cellular telephones and the difficulty in locating them and determining the origination point of cellular phone calls, which would be required under Appellees' proposed standard.

Id. at 1221-1223 (footnotes omitted).

D. Terrorism

There is presently no state definition of the term "terrorism." One federal definition of an "act of terrorism" in 18 U.S.C. s. 3077 describes that act as follows:

(1) "act of terrorism" means an activity that -
(A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and
(B) appears to be intended -
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by assassination or kidnapping. . . .

Recent federal legislation amends 18 U.S.C s. 2331 to create a definition of "domestic terrorism" that is almost identical to the definition of "act of terrorism" in 18 U.S.C. s. 3077. This legislation adds "mass destruction" to unlawful acts that affect the conduct of government. *See e.g.*, H.R. 2975, the "USA Act of 2001" (107th Congress).

III. Effect of Proposed Changes:

The CS amends s. 934.07, F.S., to provide that the Governor, the Attorney General, the Statewide Prosecutor, or any State Attorney may authorize an application to a judge of competent jurisdiction for the interception of wire, oral, or electronic communication by the Department of Law Enforcement for the investigation of the offense when such interception may provide or has provided evidence of the commission of any offense that may be an act of terrorism or in furtherance of an act of terrorism or evidence of any conspiracy to commit any such violation.

The CS also adds a definition of the term "terrorism." The definition is patterned after the federal definition in 18 U.S.C s. 3077. The substantive differences between the definition in the legislation and the federal definition are that the state definition adds violent acts or acts dangerous to human life which are violations of state or federal law; and that appear to be intended to *injure* a civilian population; or affect the conduct of government through *destruction of property* or *murder*.

The CS also amends s. 934.09, F.S., to provide an additional exemption from the requirement that an application for an intercept identify the facilities from which, or the place where, the communication is to be intercepted. This exemption is that the person whose communications are to be intercepted has removed, or is likely to remove, himself or herself to another judicial circuit within the state.

The CS also provides that, limited to investigations of acts of terrorism, the court may authorize continued interception within this state, both within and outside its jurisdiction, if the original interception occurred within its jurisdiction. It appears that this provision codifies the reasoning in *McCormick*, as well as provides statutory authority specific to the issues of continued interception.

Staff notes that it is not novel for a court to issue an order that's reach extends beyond the jurisdiction of the issuing court. For example, arrest warrants are effective outside the jurisdiction of the court issuing the warrants, and the circuit court where a person is arrested has to honor the arrest warrant of another circuit. Further, s. 39.0121(2), F.S., provides that the circuit court shall have exclusive jurisdiction of all proceedings under ch. 39, F.S. (child welfare), of a child placed with a licensed child-caring agency, or the Department of Children and Family Services, and of the adoption of children whose parental rights have been terminated pursuant to ch. 39. When the court obtains jurisdiction of any child who has been found to be dependent, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 18 years of age. Although not expressly provided, these provisions seem to contemplate orders from the court of original jurisdiction having a multijurisdictional reach.

The CS takes effect upon becoming a law. The law sunsets on July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.