

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: SB 846

INTRODUCER: Senators Brandes and Negron

SUBJECT: Search and Seizure of a Portable Electronic Device

DATE: February 21, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Pre-meeting
2.	_____	_____	JU	_____
3.	_____	_____	AP	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 846 creates special privacy protections related to personal communications devices. The bill creates a new requirement of a search warrant to search the information or communications contained in a portable electronic device (PED) when the device is going to be searched incident to arrest. It also sets forth specific restrictions on the search and seizure of information related to the “tracking” of the location of a portable electronic device.

This bill creates a new section of the Florida Statutes.

II. Present Situation:

This bill creates new law in the area of search and seizure, an area that generally changes slowly and sporadically through decisional law. The new restrictions on search and seizure in the bill apply, however, to personal communication technology that changes rapidly.

Search and Seizure

The Fourth Amendment to the United States Constitution guarantees the people in this country security in their houses, persons, papers and possessions from unreasonable searches and seizures by government actors.¹

¹ The text of the Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 12 of the Constitution of Florida contains the same guarantees as the Fourth Amendment, however the Florida provision specifically extends the protection to private communications. The Florida constitutional provision also states that it “shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution.”²

When a law enforcement officer violates a person’s constitutionally-protected right to be free from unreasonable searches or seizures, the common remedy is that the evidence obtained during the search, and evidence that may have been developed as a result of the unlawful search, are inadmissible as proof of the crime with which he or she is charged.

The search of a person who has been arrested, as well as the area within his or her immediate control or reach, is a well-recognized exception to the search warrant requirement derived from balancing the Fourth Amendment with the governmental function of providing for public safety. The exception has evolved through the application of Constitutional limitations, statutory law and case law in matters that have come before the courts. By eliminating this exception to the search warrant requirement, this bill sets forth new thresholds with which the courts should begin their legal analyses of factual situations that involve law enforcement and government agency searches of PED’s in Florida.

Currently the federal and state courts are applying two basic lines of constitutional analysis to questions on warrantless searches of PED’s incident to arrest. The U.S. Supreme Court has not yet taken a case on review that might help settle this matter.³

- *The PED as Container Theory:* Containers, even closed ones, found on a person or in his immediate control may be searched incident to arrest.⁴
- *The Search for Evidence of the Crime for Which the Person is Arrested Theory:* Some courts are seeking a balance in the search of PED’s incident to arrest by curtailing the search based upon the likelihood that the device will contain evidence of the crime for which the person is arrested. In other words, if a person is arrested for driving while his or her driver’s license is

² Article I, section 12, of the Florida Constitution provides:

Section 12. Searches and seizures.—

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

³ In *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) the court was asked to decide the issue of whether text messages should be afforded Fourth Amendment privacy protection. The court declined to reach the issue, instead ruling in the case on narrower grounds. The court stated: “The court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment... The judiciary risks error by elaborating too fully on Fourth Amendment implications of emerging technology before its role in society has become clear.” 130 S. Ct. at 2629, citing *Olmstead v. U.S.*, 277 U.S. 438 (1928).

⁴ This is well-established precedent, beginning with *Chimel v. California*, 395 U.S. 752 (1969).

suspended or revoked, there is unlikely to be evidence related to that particular crime in the PED. The analysis may lead to an entirely different conclusion when the arrest is for drug trafficking due to the PED being basically a “tool of the trade.”⁵

The Florida Supreme Court currently has jurisdiction to address the warrantless search of a PED incident to arrest and a real-time cell phone tracking case. In *Smallwood v. State*, 61 So.3d 448 (Fla. 1stDCA 2011) a cell phone search was upheld. The *Smallwood* court followed U.S. Supreme Court precedent on container searches incident to arrest. The court, however, recognized the “unique qualities of a cell phone which, like a computer, may contain a large amount of sensitive personal information,” and asked the Florida Supreme Court to review whether the general rule ought to apply to such devices.

In *Tracey v. State*, 69 So.3d 992 (Fla. 4th DCA 2011) the court held that the Fourth Amendment was not implicated in the real-time tracking situation because a person’s location on the open road is not protected by the Fourth Amendment (no reasonable expectation of privacy). However, the Tracey court performed an exhaustive analysis of Chapter 934, F.S., because the court had extended its order approving a “pen register” and “trap and trace” request under that statutory scheme to include real-time cell phone tracking. The Florida Supreme Court has exercised its discretionary jurisdiction to review the constitutional issues in this case.

The U.S. Supreme Court has recently ruled in a Global Positioning System tracking case but has not yet agreed to review a case relating to the location information of an electronic device. To the extent that a Global Positioning System (GPS) is comparable to an electronic device as defined in the bill, there may be some elements of the GPS case that apply. In *U.S. v. Jones*, 132 S.Ct. 945 (2012) the court decided that attaching a GPS tracking device to someone’s private property (motor vehicle) is a search or seizure within the meaning of the Fourth Amendment.

Current Florida Statutory Law, Security of Communications

Florida law governing security of communications is found in Chapter 934, F.S. Among the subjects covered in the chapter are procedures related to and limitations upon the government’s use of “wiretapping” and “mobile tracking devices.” This chapter mirrors the Federal statutory law found in the Electronic Communications Privacy Act of 1986.⁶

It is currently unclear how the interplay between federal law and the state law in this area will evolve. Congress has the power to regulate interstate communications; therefore, state law may be preempted by the federal law.⁷

The interception of communications and the installation and monitoring of a tracking device require a court order.⁸ To obtain a court order authorizing a wiretap the applicant must show probable cause for belief of certain facts.⁹

⁵ See for example, *United States v. Quintana*, 594 F.Supp.2d 1291 (M.D.Fla.2009).

⁶ 18 U.S.C. 2510-3127.

⁷ *State v. Rivers*, 660 So.2d 1360 (Fla. 1995); *State v. Otte*, 887 So.2d 1186 (Fla. 2004).

⁸ Section 934.42, F.S.

⁹ Section 934.09(3), F.S.

To obtain authorization for the installation and use of a mobile tracking device the applicant must certify to the court that the information likely to be obtained is relevant to an ongoing criminal investigation.¹⁰ A “mobile tracking device” is defined as an electronic or mechanical device which permits the tracking of the movement of a person or object.¹¹

An investigative or law enforcement officer may request a court order authorizing the use of a mobile tracking device or a communications intercept.¹² Section 934.01, F.S., defines these terms and law enforcement agency as follows:

- “Investigative or law enforcement officer” means any officer of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, who is empowered by law to conduct on behalf of the Government investigations of, or to make arrests for, offenses enumerated in this chapter or similar federal offenses, any attorney authorized by law to prosecute or participate in the prosecution of such offenses, or any other attorney representing the State of Florida or political subdivision thereof in any civil, regulatory, disciplinary, or forfeiture action relating to, based upon, or derived from such offenses.
- “Law enforcement agency” means an agency of the State of Florida or a political subdivision thereof or of the United States if the primary responsibility of the agency is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state and if its agents and officers are empowered by law to conduct criminal investigations and to make arrests.

Section 934.42(5), F.S., requires that the standards established by the United States Supreme Court related to mobile tracking devices be applied to the installation and use of the devices authorized by Florida law.

Section 934.09(10)(a), F.S., provides a statutory remedy for a person who has had his or her communications intercepted under the wiretap statute. This remedy is a statutorily-created Motion to Suppress (or “exclude”) the evidence derived from the wiretap. The nature of the remedy removes an alleged statutory violation from the usual Fourth Amendment search and seizure analysis.¹³

¹⁰ Section 934.42(1)(b), F.S.

¹¹ Section 934.42(6), F.S.

¹² Sections 934.42(1) and 934.09(1)(a), F.S.

¹³ See *State v. Garcia*, 547 So.2d 628 (Fla. 1989): The fourth amendment’s exclusionary rule operates as “ ‘a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.’ ” *Leon*, 468 U.S. at 906, 104 S.Ct. at 3411 (quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974)). The exclusionary rule in this case, however, is statutorily mandated. Chapter 934, F.S., pertaining to security of communications, unequivocally expresses the Legislature’s desire to suppress evidence obtained in violation of that chapter: Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court ... if the disclosure of that information would be in violation of this chapter. § 934.06, Fla.Stat. (1985).

III. Effect of Proposed Changes:

This bill creates a new section of Florida Statutes that protects a person from a post-arrest warrantless search of the contents or communications of his or her PED by a law enforcement agency or other governmental entity.

The bill also prohibits warrantless location informational tracking of an electronic device, both historical and current, by a law enforcement agency or other governmental entity. In addition, the bill states that its provisions do not create a cause of action against any foreign or Florida private entity, its officers, agents, employees or other specified persons for providing location information.

The bill also provides Legislative findings, Legislative intent, definitions, procedures and exceptions to the bill's prohibitions. There are no statutory remedies made available to an aggrieved party in the bill. Therefore alleged statutory violations based upon right to privacy claims should be analyzed in reliance upon decisional law applying constitutional principals.

Section 1: PED Defined, Legislative Findings, Legislative Intent and Warrantless Search of PED Incident to Arrest

A *PED is defined* in the bill as an object capable of being easily transported or conveyed by a person which is capable of creating, receiving, accessing, or storing electronic data or communications and that communicates with, by any means, another entity or individual.

The *Legislative findings* in this section of the bill set forth or recognize:

- The growing common usage of PED's, and that there is a reasonable and justifiable expectation of privacy in the information PED's can contain and access through the Internet.
- The language found in the Florida Constitution, that the people's right against the unreasonable interception of private communications by any means shall not be violated.
- The general requirements for a search warrant to be issued by a judge include probable cause, a supporting affidavit setting forth with particularity the place to be searched, person or thing to be seized, the communication to be intercepted, and the nature of the evidence to be obtained.¹⁴
- That the enormity of the intrusion upon an arrested person's private information and freedom of communication requires the arresting officer to obtain a search warrant in order to access the information or communication through his or her PED.

The *Legislative Intent* subsection states: It is the intent of the Legislature that this section prohibit the search of information contained in a portable electronic device, as defined in this section, by a law enforcement agency or other governmental entity at any time except pursuant to a warrant issued by a duly authorized judicial officer using established procedures.

¹⁴ See generally Ch. 933, F.S., related to search warrants.

Acts Prohibited – Search Incident to Arrest; Exceptions; Procedural Matters

A law enforcement agency or other governmental entity may not search or seize the contents and communications of a PED except pursuant to a valid search warrant. This prohibition has the effect of eliminating the warrantless search of a PED incident to arrest by a law enforcement agency or by a governmental entity.

The exceptions to the search prohibition are granted in the following circumstances:

- Reliance on other lawful exceptions to the warrant requirement. These include the exigent circumstances exception and consent exception among others.
- Searches incident to national security.
- Searches in the case of a missing child.
- Searches of transponders used for toll-collection.
- Searches in response to the user’s call for emergency services.

There is a *procedural requirement* in the bill for circumstances where a government entity is seeking the contents of a PED. The government entity must file with the appropriate court a written statement setting forth the facts giving rise to the emergency and the facts as to why the person or persons whose contents of a portable electronic device was sought are believed to be important in addressing the emergency, no later than 48 hours after seeking disclosure. Private entities providing electronic communications services are not responsible for ensuring that government entities comply with this requirement.

Section 2. Location Informational Tracking, Legislative Findings, Legislative Intent, Definitions, Prohibitions, Procedural Matters and “Hold Harmless” Clause

Location information is defined in the bill as information, concerning the location of an electronic device, including both the current location and any previous location of the device, that, in whole or in part, is generated, derived from, or obtained by the operation of an electronic device.

The *Legislative findings* in this section of the bill state: The Legislature finds that existing law authorizes a court to issue a warrant for the search of a place and the seizure of property or things identified in the warrant when there is probable cause to believe that specified grounds exist. The Legislature also finds that existing law provides for a warrant procedure for the acquisition of stored communications in the possession of a provider of electronic communication service or a remote computing service.

The *Legislative intent* is to prohibit a government entity from obtaining the location information of an electronic device without a valid search warrant issued by a duly authorized judicial officer unless certain exceptions apply, including in an emergency or when requested by the owner of the device. However, it is also the intent of the Legislature that this bill, with certain exceptions, prohibits the use of information obtained in violation of this section in a civil or administrative hearing.

The last sentence within the Legislative intent subsection of the bill indicates the expectation that a search warrant will henceforth be required in order to use location information in matters that are not limited to those that are criminal in nature.

The following terms are *defined* in this section of the bill:

- “Electronic communication service” means a service that provides to its users the ability to send or receive wire or electronic communications.
- “Government entity” means a state or local agency, including, but not limited to, a law enforcement entity or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for or on behalf of a state or local agency. In this section of the bill a law enforcement agency falls under the umbrella of “government entity” however the same can not be said for the definitions in section 1 of the bill.
- “Location information” means information, concerning the location of an electronic device, including both the current location and any previous location of the device, that, in whole or in part, is generated, derived from, or obtained by the operation of an electronic device.
- “Location information service” means the provision of a global positioning service or other mapping, locational, or directional information service.
- “Owner” means the person or entity recognized by the law as having the legal title, claim, or right to an electronic device.
- “Portable electronic device” means an object capable of being easily transported or conveyed by a person which is capable of creating, receiving, accessing, or storing electronic data or communications and that communicates with, by any means, another entity or individual.
- “Remote computing service” means the provision of computer storage or processing services by means of an electronic communications system.
- “User” means a person or entity that uses an electronic device.

Prohibition, Warrant Time Limitations. Under this section of the bill a law enforcement agency or other governmental entity must obtain a valid search warrant in order to access the location information of an electronic device. A search warrant may only be issued for a limited time and can be extended at the judge’s discretion, upon request and a finding of continuing probable cause and necessity.

So long as federal law does not prohibit disclosure of the location information, *exceptions* to the search warrant requirement occur under the following circumstances:

- Transponders used for the purpose of assessing or collecting tolls.
- Reliance by a law enforcement agency or other governmental entity on lawful exceptions to the warrant requirement.
- Cases of a search conducted incident to a national security event.
- Cases of a search for a missing child who is less than 18 years of age.
- In order to respond to the user’s call for emergency services.
- With the informed, affirmative consent of the owner or user of the electronic device concerned, provided that the owner or user may not consent to the disclosure of location

information if the device is known or believed to be in the possession of, or attached to a possession of, a third party known to the owner or user, unless that third party is less than 18 years of age. The informed, affirmative consent of the owner or user of the electronic device concerned may not be used as consent to disclose the location information of another portable electronic device that may be remotely linked or connected to the owner or user of the portable electronic device concerned.

- With the informed, affirmative consent of the legal guardian or next of kin of the electronic device's user, if the user is believed to be deceased or has been reported missing and unable to be contacted.
- If the government entity reasonably believes that an emergency involving immediate danger of death or serious physical injury to a person requires the disclosure, without delay, of location information concerning a specific person or persons and that a warrant cannot be obtained in time to prevent the identified danger and the possessor of the location information, in good faith, believes that an emergency involving danger of death or serious physical injury to a person requires the disclosure without delay.

Procedural requirement: The government entity, which includes a law enforcement agency, is required to file with the appropriate court a written statement setting forth the facts giving rise to the emergency and the facts as to why the person or persons whose location information was sought are believed to be important in addressing the emergency, no later than 48 hours after seeking disclosure. Private entities providing electronic communications services shall not be made responsible for ensuring that government entities comply with this section.

No cause of action is created by this section of the bill against any foreign or Florida private entity, its officers, employees, agents, or other specified persons, for providing location information.

The bill becomes effective July 1, 2013.

Other Potential Implications:

Chapter 934, F.S., contains provisions related to the interception of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device. This is commonly called "wiretapping." This chapter also governs the installation and monitoring of "mobile tracking devices."

It cannot be ruled out with complete certainty that any overlap between Chapter 934, F.S., and the new law created by the bill could engender confusion among practitioners or the courts. This is especially possible due to the nature of the technology as defined in the bill and in current law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The provisions in the bill would create more security for the people in their location information and communications information as related to PED's.

C. Government Sector Impact:

Law enforcement and other agencies will be limited in their ability to search a person's PED incident to arrest. Other than the manpower it may take to implement the new search warrant requirements, there is no known fiscal impact.

VI. Technical Deficiencies:

The term "other governmental entity" is not defined in this section of the bill. In Section 2 of the bill the term is defined as: a state or local agency, including, but not limited to, a law enforcement entity or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for or on behalf of a state or local agency.

It is unclear how the bill applies to the conduct of a governmental entity since protections from unreasonable search and seizure under the federal and state constitutions do not apply unless a person is in peril of losing his or her liberty because of the unlawful acts of the police power. The actual effect of the bill as applied to any "other governmental entity" that is not a law enforcement agency is therefore difficult to discern.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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