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 262
INTRODUCER:	Senator Farmer
SUBJECT:	Searches by Law Enforcement Officers
DATE:	October 6, 2017 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Jones	CJ	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 262 extends the protection against law enforcement searches by requiring a law enforcement officer to inform a person that he or she may refuse the officer's request to conduct a consensual search of the person or their property.

The statutory requirement is not applicable when the officer is acting under a valid search warrant nor does the bill appear to apply if the officer is acting under one of the lawful exceptions to the search warrant requirement.

The bill is effective July 1, 2018.

II. Present Situation:

There are four primary sources of law related to searches and seizures by law enforcement officers (LEOs) in Florida. These are:

- The Fourth Amendment of the United States Constitution;[1]
- United States Supreme Court case law interpreting and applying federal and state search and seizure law;
- Florida statutory law; and
- The Florida Supreme Court's interpretation and application of Fourth Amendment precedent, state statutory law, and state constitutional law.[2]

[1] "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." U.S. Const., Amend. IV.

[2] "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

The U.S. Supreme Court has recognized that states may extend greater protection against unlawful searches or seizures than the Fourth Amendment.[3] Examples of Florida statutory law and constitutional law extending greater protection than Fourth Amendment law include:

- The Florida constitutional requirement that a valid [search or arrest] warrant may not be issued unless it is *supported by an 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." FL Const., Art. I, Sect. 12.
- Sections 933.04, 933.06, and 933.07, F.S., setting forth statutory warrant requirements including the "supporting affidavit" described in the Florida Constitution.[4]
- Sections 901.19(1), and 933.09, F.S., requiring an officer to *knock and announce his or her authority and purpose in serving an arrest or search warrant* – and only after failing to gain admittance, to use the force necessary to enter the building.[5]

Remedy for Unlawful Searches

Where an unlawful search (or seizure) has occurred, the evidence seized as a result of the search may be suppressed, or excluded, by the trial court. However, the exclusionary rule is not always applied by the courts.

In *Herring v. U.S.*, 555 U.S. 135, 144 (2009), the court explained that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[6]

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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." FL Const., Art. I, Sect. 12.

[3] *State v. Slaney*, 653 So.2d 422, 425 (Fla. 3d DCA 1995): "[T]he states are privileged under their state law to adopt higher, but not lower, standards for police conduct than those required by the Fourth Amendment. *Cooper v. California,* 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) (state constitutional provision on search and seizure); *Sibron v. New York,* 392 U.S. 40, 61, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (state statute)."

[4] The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated and no search warrant shall be issued except upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the person and thing to be seized. Section 933.04, F.S.; Search warrants must be supported by affidavits which state facts sufficient to permit impartial magistrate to determine whether probable cause exists; to be sufficient, the affidavit must state facts, not conclusions. *Younger v. State*, 433 So.2d 636, 639 (Fla. 5th DCA 1983).

[5] If a peace officer fails to gain admittance after she or he has announced her or his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, the officer may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be. Section 901.19(1), F.S.

The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of the officer's authority and purpose he or she is refused admittance to said house or access to anything therein. Section 933.09, F.S.

[6] See *Herring* at pg. 141: "[T]he benefits of deterrence must outweigh the costs." *United States v. Leon*, 468 U.S. 897, 910 (1984). "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 368 (1988). "[T]o the extent that

Exceptions to the Search (or Arrest) Warrant Requirement

People are deemed to be secure in their persons and property against *unreasonable* searches or seizures. The lawfulness of searches and seizures are measured against this backstop. The impartial magistrate who examines the LEO's warrant request and supporting affidavit looks for the probable cause[7] upon which a lawful search or seizure may take place.[8]

While a valid warrant to conduct a search is the ideal, there are exceptions to the warrant requirement. These exceptions are based upon various factors, primarily measuring the reasonableness of the search as related to a person's expectation of privacy and the governmental interest if effecting the search.

Exceptions to the warrant requirement include:

- Search incident to a lawful arrest;[9]
- A "stop and frisk" during a temporary detention (commonly known as a "Terry" stop);[10]
- Vehicle searches under circumstances where there are officer safety and evidence preservation concerns, particularly when there is a likelihood that evidence related to the reason for the arrest will be in the vehicle;[11]
- Evidence seized because it is in "plain view" during a lawful search;[12]

application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." *Illinois v. Krull,* 480 U.S. 340 (1987).

[7] "Probable cause" means: A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Under the Fourth Amendment, probable cause — which amounts to more than a bare suspicion but less than evidence that would justify a conviction — must be shown before an arrest warrant or search warrant may be issued. *Black's Law Dictionary* (10th ed. 2014).

[8] "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

[9] "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a reasonable search under that Amendment." *U.S. v. Robinson*, 414 U.S. 218, 235 (1973).

[10] Section 901.151(2), F.S. in Florida's Stop and Frisk Law states:
"(2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense." The statute further provides that a person shall not be detained longer than reasonably necessary or moved to a different location during the detention. See also *State v. Webb*, 398 So.2d 820 (Fla. 1981).

[11] *Arizona v. Gant*, 556 U.S. 332, 339-343 (2009).

[12] Unlike other exceptions to the search warrant requirement, the plain view exception does not justify the initial intrusion into a constitutionally protected area. The initial intrusion must instead be based upon some independent justification, either some other exception to the warrant requirement or a lawfully issued search warrant. Indeed, it has sometimes been suggested that the plain view "exception" is actually not an independent exception to the warrant requirement at all, but rather is simply "an extension of whatever the prior justification for an officer's access to an object may be." See *Texas v. Brown*, 460 U.S. 730, 739 (1983).

- Inventory searches of lawfully impounded vehicles;[13]
- Entry under emergency circumstances;[14] and
- Consent searches.

Consent Searches

Although knowledge by the consenting person of his or her right to refuse consent is not an essential component of a voluntary consent to conduct a Fourth Amendment search, it is nevertheless a significant factor to consider in assessing voluntariness. See *U.S. v. Mendenhall*, 446 U.S. 544 (1980) ("[I]t is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it.").

The voluntariness of a consent search is a question of fact and must be determined by reviewing the "totality of the circumstances."[15] No one factor is enough to ascertain whether consent for a search was voluntary or coerced in some way.

Among the factors a court should consider in making its determination as to voluntariness are:
- Did the LEO use coercive words or acts, misrepresentation, deceit, or trickery such as claiming that the LEO has a lawful reason to conduct the search regardless of consent?[16]
- Would a reasonable person have felt free to end contact with the LEO?
- How many LEOs were present during the encounter, and where and what time did it occur?[17]

In *Bustamonte*, the U.S. Supreme Court rejected the argument that "proof of knowledge of the right to refuse consent is a necessary prerequisite to demonstrating a 'voluntary' consent." The court held that "[v]oluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."[18]

III. Effect of Proposed Changes:

The bill creates a new section of the Florida Statutes requiring LEOs to inform a person of the right to decline a request by the LEO to search the person or their property.

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[13] "Although an inventory search does not contemplate a criminal investigation, officers are not required to look the other way if the inventory reveals contraband. Because it is a lawful search, anything found within the legitimate confines of the search may be used as evidence." *Caplan v. State*, 531 So.2d 88, 90 (Fla. 1988).
[14] Courts have found that fire, injury, and crimes being committed upon LEOs arrival on the scene constitute emergency circumstances that do not require a search warrant for the LEOs to enter the premises and render aid. See for example *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) ("One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury…. Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.")
[15] *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).
[16] See *Bumper v. North Carolina*, 391 U.S. 543 (1968).
[17] *Ruiz v. State*, 50 So.3d 1229,1231 (Fla. 4th DCA 2011).
[18] *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

The LEO need not provide such information if the LEO is carrying out the search under a valid search warrant or some other legally sufficient justification.

Legally sufficient justifications other than a valid search warrant, presumably include the exceptions to the search warrant requirement discussed in the Present Situation Section II.

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:

None.

C. Government Sector Impact:

If the bill becomes law, there may be a need for additional LEO training. The possible fiscal impact of this training is unknown at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the section 933.50 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.