

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 311 Threats

SPONSOR(S): Judiciary Committee, Criminal Justice Subcommittee, Massullo

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 728

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	DuShane	Hall
2) Justice Appropriations Subcommittee	11 Y, 1 N	Smith	Gusky
3) Judiciary Committee	16 Y, 1 N, As CS	DuShane	Luczynski

SUMMARY ANALYSIS

A threat is a statement by which the speaker means to communicate an expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. Threats to kill or do bodily harm are not protected under the United States Constitution.

Florida law prohibits specified criminal threats. Threatening to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or to do damage to the property of any person is prohibited as a second degree felony. To prove the offense, the state does not need to prove that a person had the intent or the ability to carry out the threat, rather, the threat itself must convey an intent to do bodily harm or property damage. A threat to do bodily harm or property damage with a firearm or weapon is not currently prohibited under the law.

Under s. 836.10, F.S., certain written threats are prohibited. It is a second degree felony to:

- Write or compose and send a letter, inscribed communication, or electronic communication to any person containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or to any member of the person's family; or
- Make, post, or transmit a threat in a writing or other record, to conduct a mass shooting or an act of terrorism, in any manner that would allow another person to view the threat.

CS/CS/HB 311 prohibits a person from making a threat involving a destructive device, weapon, or firearm with intent to do bodily harm or to do damage to property likely to cause bodily harm if the threat is sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon. The bill decreases the penalty for a threat to throw or discharge a destructive device from a second degree felony to a third degree felony and assigns the same penalty to a threat to use a firearm or weapon.

The bill decreases the penalty for a written threat to kill, to do bodily injury, or to conduct a mass shooting or an act of terrorism under s. 836.10, F.S., from a second degree felony to a third degree felony. Additionally, the bill requires that a written threat to conduct a mass shooting or an act of terrorism be sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon. The bill aligns the penalty and well-founded fear requirements to those included in the prohibition from threatening to commit bodily harm or to do damage to property likely to cause bodily harm with a destructive device, firearm, or weapon.

The Criminal Justice Impact Conference reviewed a prior version of the bill with similar language on January 27, 2020, and estimated it would have a positive insignificant impact, meaning the bill may result in an increase of 10 or fewer prison beds.

The bill provides an effective date of October 1, 2020.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0311e.JDC

DATE: 2/27/2020

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Criminal Threats

A threat is a statement by which the speaker means to communicate an expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.¹ The speaker must intentionally or knowingly communicate the threat and the listener must have a reasonable fear that the speaker intends to carry out the threat.² Threats to kill or do bodily harm are not protected under the United States Constitution.³

Threatening to Throw, Project, Place, or Discharge Any Destructive Device

A person who threatens to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or to do damage to any property of any person⁴ commits a second degree felony. To prove an offense, the state is not required to show the defendant had the specific intent or the ability to carry out the threat.⁵ Rather, the state must prove that the threat itself conveyed an intent to do bodily harm or to do property damage, regardless of the speaker's actual intent or ability to carry out the threatened action.⁶ Further, the state does not have to prove the existence of an actual destructive device.⁷ As long as the state proves that the defendant threatened to throw, project, place, or discharge a destructive device, whether he or she had the actual ability to carry out the threat, it has met its burden.⁸ While s. 790.162, F.S., prohibits threats with a destructive device, the term does not encompass firearms⁹, and as such the prohibition does not apply to a threat concerning a weapon¹⁰ or firearm.^{11, 12}

¹ *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

² *Planned Parenthood v. ACLA*, 290 F.3d 1058, 1076-77 (9th Cir. 2002) (holding that a true threat is “a statement which, in the entire context and under all the circumstances, a reasonable person would foresee the statement would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.”).

³ *Saidi v. State*, 845 So. 2d 1022, 1026 (Fla. 5th DCA 2003) citing *United States v. Hutson*, 843 F.2d 1232 (9th Cir. 1988).

⁴ S. 790.162, F.S., applies to spoken threats.

⁵ *Reid v. State*, 405 So. 2d 500, 501 (Fla. 2d DCA 1981); *In re Standard Jury Instructions in Criminal Cases*, 10.8 (Fla. 2017).

⁶ *Id.*

⁷ *Valdes v. State*, 443 So. 2d 221, 222 (Fla. 1st DCA 1983).

⁸ *Id.*

⁹ 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. The term “firearm” does not include an antique firearm unless the antique firearm is used in the commission of a crime. S. 790.001(6), F.S.

¹⁰ 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. S. 790.001(13), F.S. An object qualifies as a weapon only if it is one of the objects listed in s. 790.001(13), F.S. *Streetman v. State*, 455 So. 2d 1080, 1082 (Fla. 2d DCA 1984). In interpreting what is considered a “deadly weapon” under s. 790.001(13), F.S., a deadly weapon is considered to be “any instrument that, when used in the ordinary manner contemplated by its design and construction, will or is likely to cause death or great bodily harm.” *Depasquale v. State*, 438 So. 2d 159, 160 (Fla. 2d DCA 1983).

¹¹ *L.C. v. State*, 283 So. 3d 442, 444 (Fla. 2d DCA 2019) (holding that a threat to shoot and cause harm is not prohibited by s. 790.162, F.S.).

¹² *Id.* As the legislature omitted firearms from s. 790.162, F.S., the court should not read into s. 790.162, F.S., to find a meaning from which a term has been excluded.

Written Threats

Florida law also prohibits specified written threats. Under s. 836.10, F.S., it is a second degree felony to:

- Write or compose and send a letter, inscribed communication, or electronic communication to any person containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or a threat to kill or do bodily injury to any family member of the person to whom such letter or communication is sent; or
- Make, post, or transmit a threat in a writing or other record, including an electronic record, to conduct a mass shooting or an act of terrorism, in any manner that would allow another person to view the threat.¹³

For a written threat to be considered “sent”, the communication must be deposited in the mail or by some other form of delivery, and be received by the person being threatened or by a family member of the person being threatened.¹⁴

Threats with a Firearm

While existing Florida laws prohibit specified threats with a destructive device and written threats to kill, to do bodily injury, or conduct a mass shooting or an act of terrorism, no existing law prohibits a person from verbally threatening another to do bodily harm or to do property damage with a firearm or weapon. In August 2019, multiple bailiffs overheard a Floral City man returning from a court appearance threaten to “shoot up” a local primary school.¹⁵ Authorities later discovered he had made similar threats during a recorded jail phone call. Despite having witnesses to and recordings of the verbal threats, the local State Attorney’s Office determined the threats did not meet the elements required to charge the man with any crime.¹⁶

Recognizing that such threats are not prohibited under Florida law, in its November 2019 report, the Marjory Stoneman Douglas Public Safety Commission recommended the Legislature consider creating a crime making it a felony to verbally threaten violence using a firearm or other deadly weapon.¹⁷

Justifiable Use or Threat to Use Force

Chapter 776, F.S., provides that a person is justified in using or threatening to use force, except deadly force, in the following circumstances:

- When a person reasonably believes that such conduct is necessary to defend himself or herself against another’s imminent use of unlawful force.¹⁸
- When a person in a dwelling or residence, in which he or she has the lawful right to be, believes such conduct is necessary to defend himself or herself against another’s imminent use of unlawful force or threat to use deadly force.¹⁹
- When a person reasonably believes such conduct is necessary to prevent or terminate another’s trespass on, or other tortious or criminal interference with:
 - Real property lawfully in his or her possession;
 - Real property in the possession of another who is a member of his or her immediate family or household; or

¹³ S. 836.10, F.S.

¹⁴ *O’Leary v. State*, 109 So. 3d 874, 876 (Fla. 1st DCA 2013).

¹⁵ Buster Thompson, *Florida City man who made threats to ‘shoot up’ Inverness Primary School won’t be prosecuted for them, but remains jailed on other charges*, Citrus County Chronicle (Aug. 16, 2019), https://www.chronicleonline.com/news/crime_and_courts/floral-city-man-who-made-threats-to-shoot-up-inverness/article_753668aa-c036-11e9-ae89-3bc3bf0e13df.html (last visited Feb. 26, 2020).

¹⁶ *Id.*

¹⁷ Marjory Stoneman Douglas High School Public Safety Commission, *Report Submitted to the Governor, Speaker of the House of Representatives, and Senate President*, fdle.state.fl.us/MSDHS/MSD-Report-2-Public-Version.pdf (last visited Feb. 26, 2020).

¹⁸ S. 776.012(1), F.S.

¹⁹ S. 776.013(1), F.S.

- Real property of a person that he or she has a legal duty to protect.²⁰

Criminal Punishment Code - Offense Severity Ranking Chart

Felony offenses subject to the Criminal Punishment Code²¹ are listed in a single offense severity ranking chart, which uses 10 offense levels to rank felonies from least severe (level 1) to most severe (level 10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute.²² A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense.²³ A person may also accumulate points for factors such as victim injury, violating a community sanction, and certain sentencing multipliers.²⁴ The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.²⁵

Threatening to throw, project, place, or discharge any destructive device prohibited under s. 790.162, F.S., is currently ranked as a level five offense on the offense severity ranking chart. Written threats to kill or to do bodily injury or to conduct a mass shooting or an act of terrorism prohibited under s. 836.10, F.S., are currently ranked as a level six offense on the offense severity ranking chart.

Effect of Proposed Changes

CS/CS/HB 311 prohibits a person from making a threat involving a destructive device, firearm, or weapon if the threat is sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon. The bill decreases the current penalty for threatening the use of a destructive device from a second degree felony to a third degree felony. Under the bill, a person who threatens the use of a destructive device, firearm, or weapon commits a third degree felony. A weapon is limited to its definition in s. 790.001, F.S., meaning 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.

The bill provides that it is not unlawful for a person to use or threaten to use a weapon or firearm in lawful self-defense, lawful defense of others, or lawful defense of property.

Additionally, the bill decreases the penalty for a written threat to kill, to do bodily injury, or to conduct a mass shooting or an act of terrorism from a second degree felony to a third degree felony. Under the bill, a written threat to conduct a mass shooting or an act of terrorism must be sufficient to cause a well-founded fear in a reasonable person. The bill aligns the penalty and well-founded fear requirements to those included in the prohibition from threatening to commit bodily harm or to do damage to property likely to cause bodily harm with a destructive device, firearm, or weapon.

The bill conforms the Criminal Punishment Code offense severity ranking chart to include the new offense for threats involving a firearm or weapon as a level five offense and reflect the decreased penalties for existing offenses.

The bill provides an effective date of October 1, 2020.

²⁰ S. 776.031(1), F.S.

²¹ All felony offenses, other than capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

²² S. 921.0022, F.S.

²³ Ss. 921.0022 and 921.0024, F.S.

²⁴ S. 921.0024(2), F.S.

²⁵ *Id.*

B. SECTION DIRECTORY:

Section 1: Amends s. 790.162, F.S., relating to threat to throw, project, place, or discharge any destructive device; felony; penalty.

Section 2: Amends s. 836.10, F.S., relating to written threats to kill, do bodily injury, or conduct a mass shooting or an act of terrorism; punishment; exemption from liability.

Section 3: Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 4: Provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference considered a prior version of the bill with similar language on January 27, 2020, and determined it will likely have a positive insignificant impact, meaning it will result in an increase of 10 or fewer prison beds.²⁶

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill appears to be exempt from the requirements of Article VII, Section 18, of the Florida Constitution because it is a criminal law.

2. Other:

None.

²⁶ Criminal Justice Impact Conference, HB 311 – Threats, January 27, 2020, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/HB311.pdf>

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 3, 2020, the Criminal Justice Subcommittee adopted an amendment, and reported the bill favorably as a committee substitute. The amendment:

- Decreased the penalty for threatening to use a destructive device, weapon, or firearm from a second degree felony to a third degree felony.
- Limited the scope of what is considered a “weapon” to the definition in s. 790.001, F.S.
- Required that a threat to use a firearm or weapon be sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon.
- Provided that a person who threatens to use a firearm or any other weapon in lawful self-defense, lawful defense of others, or lawful defense of property does not commit the crime.
- Updated the offense severity ranking chart to reflect the decrease in penalty for threats made with a destructive device, weapon, or firearm.

On February 26, 2020, the Judiciary Committee adopted a strike all amendment, and reported the bill favorably as a committee substitute. The amendment:

- Required threats involving a destructive device to be sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon.
- Limited prohibited threats to do property damage involving a destructive device, weapon, or firearm to threats to do property damage that will likely result in bodily harm.
- Decreased the penalty from a second degree felony to a third degree felony for any written threat to kill, to do bodily injury, or to conduct a mass shooting or an act of terrorism.
- Required a written threat to conduct a mass shooting or act of terrorism to be sufficient to cause a well-founded fear in a reasonable person that the threat will be acted upon.
- Updated the offense severity ranking chart to reflect the decreased penalty for written threats.
- Made a technical reorganization change.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.