

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 Infrastructure and Security

BILL: SB 728

INTRODUCER: Senator Stargel

SUBJECT: Threats

DATE: January 9, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Miller	IS	Pre-meeting
2.			CJ	
3.			AP	

I. Summary:

SB 728 prohibits threats to use a firearm or weapon with intent to do bodily harm to any person or to do damage to any property of any person. A conviction for a threat to use a firearm or weapon would be included in the same section of law currently applicable to a threat to throw, project, place, or discharge any destructive device, a second degree felony. Under current case law, the State would be required to prove that a defendant threatened to use a firearm or any weapon and that the threat conveyed an intent to do bodily harm to or damage to the property of any person. The State would not be required to prove the existence of an actual firearm or weapon and not be required to prove a defendant had actual intent or ability to carry out the threat.

The Criminal Justice Impact Conference has not yet reviewed the bill.

The bill takes effect October 1, 2020.

II. Present Situation:

Definitions

Chapter 790, Florida Statutes, relating to weapons and firearms, among others, defines the following terms for purposes of that chapter:

- Destructive device “means any bomb, grenade, mine, rocket, missile, pipebomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary, explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled; any device declared a destructive device by the Bureau of Alcohol,

Tobacco, and Firearms;¹ any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one-half inch or more in diameter; and ammunition for such destructive devices, but not including shotgun shells or any other ammunition designed for use in a firearm other than a destructive device.”²

- 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.”³
- 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.”⁴

Apparently, depending on the facts of a given criminal case, a “destructive device” may also be a “firearm” or a “weapon,” but a “weapon” is not a “firearm.” Further, *all* firearms may not meet the definition of “destructive device;” *e.g.*, many pistols do not have barrels with a bore of one-half inch or more in diameter. Additionally, the definition of “weapon” includes items that do not appear to meet the definition of “destructive device,” and the broad phrase “other deadly weapon,” may also not meet the definition of “destructive device,” depending on the item used in a given criminal case.

¹ For the purposes of the National Firearms Act, the term “destructive device” means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term “destructive device” shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 7684(2), 7685, or 7686 of title 10, United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes. 26 U.S.C. 5845(f).

² The term under Florida law does not include “a device which is not designed, redesigned, used, or intended for use as a weapon; any device, although originally designed as a weapon, which is redesigned so that it may be used solely as a signaling, line-throwing, safety, or similar device; any shotgun other than a short-barreled shotgun; or any nonautomatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for use for the hunting of big game.” Section 790.001(4), F.S.

³ The term does not include an antique firearm unless the antique firearm is used in the commission of a crime. Section 790.001(6), F.S.

⁴ Section 790.001(13), F.S.

Making, Possessing, Throwing, Projecting, Placing or Discharging any Destructive Device

Section 790.161, F.S., prohibits willfully⁵ and unlawfully⁶ making, possessing,⁷ throwing, projecting, placing, or discharging any destructive device, or attempting to do so. A violation is a third degree felony, punishable by a term of imprisonment not exceeding five years.⁸ However, if the act:

- Is committed with intent to do bodily harm to any person or to do property damage, or if the result is a disruption of governmental operations, commerce, or the private affairs of another person, a violation is increased to a second degree felony, punishable by a term of imprisonment not exceeding 15 years.⁹
- Results in bodily harm to another person or in property damage, a violation is elevated to a first degree felony, punishable by a term of imprisonment not exceeding 30 years or, when provided by statute, an imprisonment term not exceeding life.¹⁰
- Results in the death of another person, a violation is a capital felony, punishable by death or by life imprisonment with no eligibility for parole.¹¹

A conviction under s. 790.161, F.S., requires the State to prove that a defendant acted intentionally, knowingly, and purposely.¹²

In contrast to the State's burden of proving a defendant acted intentionally, knowingly, and purposely for a conviction under s. 790.161, F.S., a person who unlawfully throws, projects, places, or discharges a destructive device or bomb resulting in any bodily harm to another person, *regardless of intent or lack of intent to cause such harm*, violates s. 790.1615, F.S., and commits a first degree misdemeanor, punishable by a term of imprisonment not exceeding one year and up to \$1,000 fine.¹³ Under s. 790.1615, F.S., if the result is great bodily harm, permanent disability, or permanent disfigurement, *regardless of intent or lack of intent*, a violation is a second degree felony, punishable by an imprisonment term not exceeding 15 years and up to a \$10,000 fine.¹⁴

Further, a person found guilty may be sentenced separately for any violation of s. 790.1615, F.S., and for any unlawful throwing, projecting, placing, or discharging of a destructive device or

⁵ Meaning intentionally, knowingly, and purposely. See Florida Criminal Jury Instruction 10.7(a) available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited December 31, 2019).

⁶ For illustration, it is not unlawful for the governing body of any municipality or county or the Division of State Fire Marshal of the Department of Financial Services to authorize the manufacture, possession, and use of destructive devices. Section 790.1612, F.S.

⁷ To prove possession of a destructive device, the State must prove beyond a reasonable doubt that a defendant knew of the existence of the destructive device, and intentionally exercised control over that device. See Florida Criminal Jury Instruction 10.7(a) available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited December 31, 2019).

⁸ Section 775.082(3)(e), F.S.

⁹ Section 775.082(3)(d), F.S.

¹⁰ Section 775.082(3)(b), F.S.

¹¹ Section 775.082(1)(a), F.S.

¹² See Florida Criminal Jury Instruction 10.7(a)-(d) available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited December 31, 2019).

¹³ Sections 790.1615 and 775.082(4)(a), F.S.

¹⁴ Section 775.082(3)(d), F.S.

bomb committed during the same criminal episode.¹⁵ However, a conviction for any unlawful throwing, projecting, placing, or discharging of a destructive device or bomb is not necessary for a conviction under s. 790.1615, F.S.¹⁶

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

Section 790.162, F.S. currently makes it unlawful for any person to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person.¹⁷ A violation is a second degree felony, punishable by an imprisonment term not exceeding 15 years and up to a \$10,000 fine.¹⁸

Because the language of s. 790.162, F.S., references intent to do bodily harm or property damage, as also reflected in s. 790.161, F.S., and because the language of s. 790.1615, F.S., clearly excludes a defendant's intent as a required element of proof, a conclusion that a conviction under s. 790.162, F.S., also requires the State to prove that a defendant acted intentionally, knowingly, and purposely may be reasonable. However, no such proof is required for a conviction under s. 790.162, F.S.

To the contrary, currently applicable case law provides:

Section 790.161 provides that it is unlawful for any person to throw, place or discharge a destructive device with intent to do bodily harm or damage to property. Section 790.162, which essentially tracks the same language, was obviously intended to cover a *threat* to carry out the conduct proscribed by section 790.161. Viewed in this context, we think that section 790.162 requires only that the threat must convey an intent to do bodily harm or damage to property. Here, appellant's threat obviously conveyed this intent. Therefore, under our construction of the statute, *whether appellant intended to follow through with his threat was irrelevant.*¹⁹

In addition:

[T]he State need not prove the existence of an actual destructive device. It is sufficient that the State prove that the defendant *threatened* to throw, place, or discharge a destructive device with the stated intent to do bodily harm to any person or with the stated intent to do damage to any property of any person, *regardless of whether the defendant had the actual ability to carry out that threat.*²⁰

¹⁵ Section 790.1615(3), F.S.

¹⁶ *Id.*

¹⁷ Written threats may be prosecuted under s. 836.10, F.S.

¹⁸ *Supra* note 11.

¹⁹ *Reid v. State*, 405 So.2d. 500 (Fla. 2d DCA 1981). (*Emphasis added.*)

²⁰ *Valdes v. State*, 443 So.2d 221 (Fla. 1st DCA 1983). (*Emphasis added.*) See also Florida Criminal Jury Instruction 10.8 available at <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-10/> (last visited January 1, 2020). "It is not necessary for the State to prove the defendant had the actual intent to cause [harm] [or] [damage], or that [he] [she] had the ability to carry out the threat, or that there was an actual destructive device."

III. Effect of Proposed Changes:

The bill amends s. 790.162, F.S., to expand that section's applicability to also include threats involving a firearm or any weapon, as defined under current law. Under the bill, it is unlawful for any person to threaten the use of a firearm or any weapon (in addition to threatening to throw, project, place, or discharge any destructive device). Under the current case law applicable to s. 790.162, F.S., the State would presumably need only to prove that a defendant threatened to use a firearm or any weapon, and that the defendant's threat conveyed an intent to do bodily harm or property damage. The State would apparently not be required to prove the existence of an actual firearm or weapon, not be required to prove a defendant had actual intent to carry out the threat, and not be required to prove a defendant had the actual ability to carry out the threat.

The bill also amends s. 921.0222, F.S., the offense severity ranking chart of the Criminal Punishment Code to revise the description of the existing second degree felony for a violation of s. 790.162, F.S., from "Threat to throw or discharge destructive device," to "Threat involving firearm, weapon, or destructive device."

The bill takes effect October 1, 2020.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference has not yet reviewed this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends the following sections of the Florida Statutes: 790.162 and 921.0022.

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.