

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 Rules

BILL: CS/SB 1802

INTRODUCER: Criminal Justice Committee and Senator Pizzo

SUBJECT: Interception of Wire, Oral, or Electronic Communications Made in Violation of Protective Orders

DATE: April 2, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<u>Favorable</u>
2.	<u>Cellon</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
3.	<u>Bond</u>	<u>Phelps</u>	<u>RC</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1802 provides that it is lawful for a person who is protected by an injunction for repeat violence, sexual violence, dating violence, domestic violence, stalking, or any other court-imposed prohibition of conduct toward the person, to intercept and record a wire, oral, or electronic communication received in violation of the injunction or order. Therefore, the bill creates an exception to the general prohibition against interceptions of wire, oral, or electronic communications without the consent of all parties.

The bill allows a person to provide such a recording only to law enforcement or a court for the limited purpose of proving a violation of an injunction or court order.

The bill will have a positive insignificant fiscal impact on the Department of Corrections. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2021.

II. Present Situation:

Wiretapping

In Florida, intentionally intercepting¹ an oral communication,² commonly known as wiretapping, is generally a third degree felony,³ with limited exceptions. For example, it is not a crime for a person to intercept an oral communication if:

- All parties to the communication consent to the interception;⁴ or
- The person is a law enforcement officer or a person acting under the direction of a law enforcement officer and:
 - He or she is a party to the communication;
 - One of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act;⁵
- The person is a child under 18 years of age and:
 - He or she is a party to the communication; and
 - Has reasonable grounds to believe the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or act of physical force or violence against the child.⁶

An oral communication that is intercepted illegally cannot be used as evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority or political subdivision of the state.⁷ When a communication has been unlawfully intercepted, an aggrieved party may move to suppress the contents of the interception or any evidence derived from it.⁸

However, not all wiretapping is subject to exclusion. Florida only protects oral communications by a person exhibiting an expectation of privacy under circumstances reasonably justifying the person's expectation of privacy.⁹

¹ "Intercept" means 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. Section 934.02, F.S.

² "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication. Section 934.02, F.S.

³ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

⁴ Section 934.03(2)(d), F.S.

⁵ Section 934.03(2)(c), F.S.

⁶ Section 934.03(2)(k), F.S. This particular exception to the prohibition on recording another's communication was passed by the Legislature in 2015 after the Florida Supreme Court ruled in 2014 that surreptitious recordings by a sixteen year old girl who was "essentially conducting her own investigation, hoping to prompt [her stepfather] into making incriminating statements...as evidence of [sexual] abuse" were inadmissible at trial. The Court explained that the recordings did not fall under any exception in s. 934.03(2), F.S., but the Court noted, "[i]t may well be that a compelling case can be made for an exception...[b]ut the adoption of such an exception is a matter for the Legislature." *McDade v. State*, 154 So.3d 292 (Fla. 2014).

⁷ Section 934.06, F.S.

⁸ Sections 934.06 and 934.09(10)(a), F.S.

⁹ *State v. Inciarrano*, 473 So.2d 1272, 1275 (Fla. 1985).

Protective Injunctions

A court may prohibit a person from contacting another person by granting a petition for an injunction or entering a no contact order in a criminal case. Protective injunctions are available under Florida law for victims of the following:

- Domestic violence;¹⁰
- Repeat violence;¹¹
- Sexual violence;¹²
- Dating violence;¹³ and
- Stalking.¹⁴

As soon as possible after the petition is filed, a court must set a hearing to determine:

- Whether the petitioner is a victim of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence;¹⁵
- Whether an immediate and present danger of repeat, sexual, or dating violence exists;¹⁶ or
- Whether stalking exists.¹⁷

The court may grant an ex parte temporary injunction for 15 days.¹⁸ A court must then set a hearing with notice to the respondent, and after the hearing with notice, may grant protective injunctive relief as it deems proper, including a permanent injunction.¹⁹

Protective injunctions may prohibit:

- The respondent from committing any additional acts of violence, stalking, or cyberstalking;²⁰
- The respondent from going to, or being within 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;²¹ or
- The respondent from knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied.²²

Additionally, a court may order the respondent to vacate the dwelling that the parties share,²³ to participate in treatment, intervention, or counseling services to be paid for by the respondent,²⁴ and order any other such relief as the court deems necessary to protect a victim.²⁵

¹⁰ Section 741.30, F.S.

¹¹ Section 784.046, F.S.

¹² *Id.*

¹³ *Id.*

¹⁴ For the purposes of protective injunctions, stalking includes cyberstalking. Section 784.0485, F.S.

¹⁵ Section 741.30(6)(a), F.S.

¹⁶ Section 784.046(6)(a), F.S.

¹⁷ Section 784.0485(5)(a), F.S.

¹⁸ Sections 741.30(5)(a), (c), 784.046(6)(a), (c), and 784.0485(5)(a) and (c), F.S.

¹⁹ Sections 741.30(6)(a), 784.046, and 784.0485, F.S.

²⁰ Sections 741.30(6)(a)1., 784.046(7)(a), and 784.0485(6)(a)1., F.S.

²¹ Sections 741.31(4)(a)2., 784.047(1)(b), and 784.0487(4)(a)1., F.S.

²² Sections 741.31(4)(a)6., 784.047(1)(f), and 784.0487(4)(a)5., F.S.

²³ Sections 741.31(4)(a)1., and 784.047(1)(a), F.S.

²⁴ Sections 741.30(6)(a)2., and 784.047(1)(a)

²⁵ Sections 741.30(6)(a)8., 784.046(7)(b), and 784.0485(6)(a)4., F.S.

Violation of a protective injunction is generally a first degree misdemeanor, however, a person with two or more prior convictions for violating an injunction who subsequently commits another violation against the same victim, commits a third degree felony.²⁶

No Contact Order

When a court has jurisdiction over a defendant in criminal court, the court may order no contact with the victim in the case as a condition of pretrial release or as part of a defendant's sentence. Unlike the process of the victim seeking an injunction, a no contact order does not require that the victim ask the court to enter the order. A defendant's violation of a no contact order may result in revocation of bond, contempt of court charges, violation of probation, or, in the case of domestic violence, additional criminal charges.²⁷ A no contact order only remains in effect, as long as the pretrial release condition or postsentencing period of supervision applies to the defendant. Once the case is closed and the defendant is no longer subject to any terms and conditions of his or her sentence, the no contact order no longer has effect.

III. Effect of Proposed Changes:

The bill creates a new exception in s. 934.03, F.S., to the general prohibition in that statute against interception of wire, oral, or electronic communications. The bill provides that it is lawful for a person who is protected under an active temporary or final injunction for repeat violence, sexual violence, or dating violence under s. 784.046, F.S.; stalking under s. 784.0485, F.S.; domestic violence under s. 741.30, F.S.; or any other court-imposed prohibition of conduct toward the person to intercept and record a wire, oral, or electronic communication received in violation of such injunction or court order.

The bill allows a person to provide such a recording only to law enforcement or a court for the limited purpose of proving a violation of an injunction or court order.

The bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²⁶ Sections 741.31, 784.047, and 784.0487, F.S. A first degree misdemeanor is punishable by up to a year in the county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

²⁷ Section 741.31, F.S.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference considered SB 1802 and the identical²⁸ House bill, HB 583, on March 8, 2021. The Conference determined that the bill will have a positive insignificant fiscal impact on the prison bed population of the Department of Corrections. This means that there will be an increase of 10 or fewer prison beds.²⁹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 934.03 of the Florida Statutes.

²⁸ Since March 8, 2021, the Senate bill (CS/SB 1802) and House bill (HB 583) are no longer identical. The Senate bill has added victims of stalking who have an active temporary or final injunction to the list of persons who may lawfully intercept and record a wire, oral, or electronic communication received in violation of such injunction or court order. However, this is not likely to change the prison bed impact.

²⁹ Economic and Demographic Research, Criminal Justice Impact Conference (March 8, 2021), available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/HB583.pdf> (last visited March 15, 2021).

IX. Additional Information:

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

CS by Criminal Justice on March 23, 2021:

The committee substitute adds victims of stalking who have an active temporary or final injunction to the list of persons who may lawfully intercept and record a wire, oral, or electronic communication received in violation of such injunction or court order.

- B. **Amendments:**

None.