

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: SB 1850

INTRODUCER: Senator Perry

SUBJECT: Electronic Threats

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Jones</u>	<u>CJ</u>	Favorable
2.	<u>Cellon</u>	<u>Phelps</u>	<u>RC</u>	Favorable

I. Summary:

SB 1850 amends s. 836.10, F.S., to prohibit a person from sending, posting, transmitting, or procuring the sending, posting, or transmission of a writing or other record, including an electronic record, in any manner in which it may be viewed by another person, when in such writing or record the person makes a threat to:

- Kill or to do bodily harm to another person; or
- Conduct a mass shooting or an act of terrorism.

This bill removes the requirement in current law that a threat posted online be specifically sent to and received by the person who is the subject of the threat.

The bill defines the previously undefined term of “electronic record” as any record created, modified, archived, received, or distributed electronically which contains any combination of text, graphics, video, audio, or pictorial represented in digital form, but does not include a telephone call.

The bill does not alter the current penalty for a violation of s. 836.10, F.S., which is a second degree felony, punishable by up to 15 years imprisonment and a \$10,000 fine.

The bill has a positive indeterminate prison bed impact on the Department of Corrections. See Section V. Fiscal Impact Statement.

The bill is effective October 1, 2021.

II. Present Situation:

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 “True threats” to inflict bodily injury or death are not speech protected under the First Amendment of the U.S. Constitution.² To rise to the level of a “true threat,” the person making the threat must intentionally or knowingly communicate the threat and the subject of the threat must have a reasonable fear that the person making the threat intends to carry out the threat.³

Section 836.10, F.S., prohibits the written communication of certain threats. It is a second degree felony⁴ for a person to make a written threat to a specific person or when a person makes a threat, in writing, to conduct a mass shooting or an act of terrorism. Specifically, a person violates s. 836.10, F.S., when he or she:

- Writes or composes and also sends, or procures the sending of, any letter, inscribed communication, or electronic communication, signed or anonymous, to any person which contains 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 member of the family of the person to whom such letter or communication is sent;⁵ or
- Makes, posts, or transmits 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.

Florida courts have reviewed s. 836.10, F.S., and found the current form of the statute not to be unconstitutional.⁶

Florida law has evolved over time. In 2010, the Legislature criminalized threats made over “electronic communication,” however, the provision of the statute requiring a threat be sent directly to the person who is the subject of the threat, or to a person whose family member is the subject of the threat remained unchanged.⁷

A 2016 case determined that a child’s public posting on Twitter that he was going to “shoot up” his school was not sent *directly* to a *specific person*, therefore the child’s conduct did not violate

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

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

³ *Smith v. State*, 532 So.2d 50 (Fla. 2d DCA 1988); *See also Puy v. State*, 294 So.3d 930 (Fla. 4th DCA 2020), holding that the issue of whether a message sent by a former high school student to his friends via Snapchat, which contained a photograph of himself with the caption “On my way! School shooter,” could cause alarm in a reasonable person, such that the message constituted a threat, was a question for the jury to decide.

⁴ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

⁵ The act of “sending” a threat has been described as a two-part action. The action must be both “depositing” the communication for “delivery” and the “receipt” of the communication *by the person being threatened*. *State v. Wise*, 664 So.2d 1028 (Fla. 2d DCA 1995); *O’Leary v. State*, 109 So.3d 874 (Fla. 1st DCA 2013).

⁶ *Saidi v. State*, 845 So.2d 1022 (Fla. 5th DCA 2003); *See also Smith v. State*, 532 So.2d 50 (Fla.2d DCA 1988).

⁷ Chapter 2010-51, L.O.F.

s. 836.10, F.S.⁸ The court noted that many threats made on social media fall outside the narrow scope of the law, which requires the communication to be sent directly to a specific person.⁹

After the *J.A.W.* opinion, the Legislature again amended s. 836.10, F.S., to include the making, posting, or transmitting of 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, the second way a person may violate the statute.¹⁰

Although the 2018 amendment to s. 836.10, F.S., captured circumstances involving a threat made to a group of people and eliminated the requirement that a threat be communicated directly to a specific person, the requirement that a threat made to an individual be sent directly to the subject of the threat or to a person whose family member was the subject of the threat remains in current law.¹¹

III. Effect of Proposed Changes:

The bill amends s. 836.10, F.S., to prohibit a person from sending, posting, transmitting, or procuring the sending, posting, or transmission of a writing or other record, including an electronic record, in any manner in which it may be viewed by another person, when in such writing or record the person makes a threat to:

- Kill or to do bodily harm to another person; or
- Conduct a mass shooting or an act of terrorism.

The bill criminalizes publicly posting a threat online, even if it is not specifically sent to or received by the person who is the subject of the threat.¹²

The bill defines the previously undefined term of “electronic record” as any record created, modified, archived, received, or distributed electronically which contains any combination of text, graphics, video, audio, or pictorial represented in digital form, but does not include a telephone call.

The bill retains the current second degree felony penalty for a violation of s. 836.10, F.S.

The bill is effective October 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

⁸ *J.A.W. v. State*, 210 So.3d 142 (Fla. 2d DCA 2016).

⁹ *Id.*

¹⁰ Chapter 2018-3, s. 17, L.O.F.

¹¹ Section 836.10(1), F.S.

¹² Criminal prosecution of threats is limited by case law to those threats that are intentionally or knowingly made, and that are sufficient to cause alarm in a reasonable person.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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 the bill on March 8, 2021, and determined that the bill will result in a positive indeterminate (i.e. an unquantifiable increase) prison bed impact on the Department of Corrections.¹³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 836.10, and 921.0022.

¹³ Economic and Demographic Research, Criminal Justice Impact Conference, March 8, 2021, available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm> (last visited March 11, 2021).

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.

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