

**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.)

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Prepared By: The Professional Staff of the Committee on Criminal Justice

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BILL: SB 174

INTRODUCER: Senator Polsky

SUBJECT: Obscene or Harassing Telephone Calls

DATE: April 3, 2023

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Stokes</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>FP</u>	_____

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**I. Summary:**

SB 174 amends s. 365.16, F.S., which punishes obscene or harassing telephone calls. The bill increases the offense from a second degree misdemeanor to a third degree felony. The bill also removes an element of the offense, which is that the telephone call must be made “to a location at which the person receiving the call has a reasonable expectation of privacy.”

The bill may have an indeterminate prison bed impact.

The bill takes effect October 1, 2023.

**II. Present Situation:**

**Obscene or Harassing Telephone Calls**

Section 365.16, F.S., provides that it is a second degree misdemeanor<sup>1</sup> to:

- Make a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number;
- Make a telephone call, whether or not conversation ensues, without disclosing his or her identity and with intent to annoy, abuse, threaten, or harass any person at the called number;
- Make or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

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<sup>1</sup> A second degree misdemeanor is punishable by not more than 60 days in county jail and a fine not exceeding \$500. Sections 775.082 and 775.083, F.S.

- Make repeated telephone calls, during which conversation ensues, solely to harass any person at the called number.<sup>2</sup>

It is also a second degree misdemeanor to knowingly permit any telephone under his or her control to be used for any purpose prohibited by s. 365.16, F.S.<sup>3</sup>

Section 365.16, F.S., does not apply to telephone calls made in good faith in the ordinary course of business or commerce.<sup>4</sup>

### III. Effect of Proposed Changes:

The bill amends s. 365.16, F.S., which punishes obscene or harassing telephone calls. The bill increases the offense from a second degree misdemeanor to a third degree felony.<sup>5</sup> The bill also removes an element of the offense, which is that the telephone call must be made “to a location at which the person receiving the call has a reasonable expectation of privacy.”

The bill takes effect October 1, 2023.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

#### B. Public Records/Open Meetings Issues:

None.

#### C. Trust Funds Restrictions:

None.

#### D. State Tax or Fee Increases:

None.

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<sup>2</sup> Section 356.16(1), F.S.

<sup>3</sup> Section 356.16(2), F.S.

<sup>4</sup> Section 356.16(5), F.S.

<sup>5</sup> A third degree felony is generally punishable by not more than 5 years in state prison and a fine not exceeding \$500. Sections 775.082 and 775.083, F.S.

E. Other Constitutional Issues:

**Florida Supreme Court Cases on Section 365.16, F.S.**

Section 365.16, F.S., was amended after the Florida Supreme Court found the statute unconstitutional.<sup>6</sup>

Originally, section 365.16(1)(a), Florida Statutes (1977), criminalized individuals who, “by means of telephone communication,” made “any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent.” § 365.16(1)(a), Fla. Stat. (1977); *State v. Keaton*, 371 So.2d 86 (Fla.1979). The requirement that the telephone call be made “to a location at which the person receiving the call has a reasonable expectation of privacy” was added after the Florida Supreme Court held that the 1977 version of section 365.16(1)(a) violated freedom of speech rights guaranteed by the Florida and federal constitutions.<sup>7</sup>

The Florida Supreme Court noted in *State v. Keaton* that it was not holding “that the state may not proscribe obscene telephone communications regardless of the circumstances.”<sup>8</sup> The Court further noted:

Were section 365.16(1)(a) limited to obscene calls to a listener at a location where he enjoys a reasonable expectation of privacy (such as the home) which calls are intended to harass the listener, the enactment would pass constitutional muster. Because such a statute would assume the existence of a listener who is unwillingly subjected to vulgar or obscene epithets, it would constitute a valid legislative attempt to protect the substantial privacy interests of the listener.<sup>9</sup>

In *Gilbreath v. State*,<sup>10</sup> the Florida Supreme Court upheld the constitutionality of s. 365.16(1), F.S., which includes the language “to a location at which the person receiving the call has a reasonable expectation of privacy.” The Court’s holding primarily relies on the inclusion of that language.<sup>11</sup>

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

<sup>6</sup> Chapter 79-20, L.O.F.

<sup>7</sup> *Avrich v. State*, 936 So.2d 739, 741 (Fla. 3d DCA 2006), citing *Keaton*, 371 So.2d at 90.

<sup>8</sup> *State v. Keaton*, 371 So.2d 86, 92 (Fla. 1979).

<sup>9</sup> *Id.*

<sup>10</sup> *Gilbreath v. State*, 650 S.2d 10 (Fla. 1995).

<sup>11</sup> See *Gilbreath*, 650 So.2d at 11-12. The Court also restricted “the statute only to class or language that intends to abuse, threaten or harass.” *Id.* at 12.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill.

The bill creates an unranked third degree felony.<sup>12</sup> The bill may have an indeterminate impact on state prison beds.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 365.16 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.

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

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<sup>12</sup> The third degree felony is not ranked in the offense severity ranking chart of the Criminal Punishment Code (s. 921.0022, F.S.), so it defaults to level 1 under s. 921.0023, F.S.