

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 1618

INTRODUCER: Senator Martin

SUBJECT: Interception and Disclosure of Oral Communications

DATE: February 13, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Stokes</u>	<u>CJ</u>	Favorable
2.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	<u>Cellon</u>	<u>Twogood</u>	<u>RC</u>	Favorable

I. Summary:

SB 1618 creates a new exception to the prohibition located in s. 934.03(1), F.S., against a person intentionally intercepting, endeavoring to intercept, or procuring any other person to intercept or endeavor to intercept any wire, oral, or electronic communication.

The exception allows a parent or legal guardian of a child who is younger than 18 years of age to intercept and record an oral communication if the child is a party to the communication and the parent or guardian has reasonable grounds to believe that recording the communication 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 an unlawful act of physical force or violence against the child.

A recording authorized by the bill which captures a statement by a party that the party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against a child:

- Must be provided to a law enforcement agency and
- May be used for the purpose of evidencing the intent to commit or the commission of a crime specified in the bill against a child.

A parent or legal guardian who makes a recording authorized by the bill may not share or disseminate the recording with any person or entity other than a law enforcement agency.

The bill is effective upon becoming a law.

II. Present Situation:

Privacy in One's Oral Communication - Statutory Law

Chapter 934, F.S., governs the security of electronic and telephonic communications. Although most provisions in the chapter relate to law enforcement officers' and communication professionals' actions and limitations, some apply just as well to average citizens.

One such provision is s. 934.03(4), F.S., which contains criminal offenses and corresponding penalties for intercepting another's oral communication *unless* the chapter contains an exception.¹

An exception is set forth in s. 934.03(2)(k), F.S., which provides that it is *lawful*:

- For a child under 18 years of age to intercept and record an oral communication;
- If the child is a party to the communication and has reasonable grounds to believe that;
- Recording the communication 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 an unlawful act of physical force or violence against the child.²

The admissibility into evidence of an intercepted and recorded oral communication of another is not guaranteed. Section 934.06, F.S., provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in 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 of the state, or a political subdivision thereof, *if the disclosure of that information would be in violation of this chapter.*"

"Oral communication" is defined as an 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.³ Not all oral communication under s. 934.02(2), F.S., is spoken by a person who has a reasonable expectation of privacy in his or her communication. That question largely depends on the facts and circumstances of the utterance.

A person's expectation of privacy when the communication occurs in an open, public area does not necessarily amount to a reasonable expectation of privacy.⁴ However, if the communication occurs in a private location and the interception and recording is done in a surreptitious manner,

¹ The prohibition located in s. 934.03(1), F.S., against intentionally intercepting, endeavoring to intercept, or procuring any other person to intercept or endeavor to intercept any wire, oral, or electronic communication, is punishable as a third degree felony. Section 934.03(4), F.S. A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S. Note that s. 934.41, F.S., contains an alternative fine under limited circumstances.

² See also, s. 934.03(2)(l), F.S., for a similar exception 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; stalking under s. 784.0485; domestic violence under s. 741.30; 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."

³ Section 934.02(2), F.S.

⁴ *State v. Garcia*, 252 So. 3d 783 (Fla. 3d DCA 2018); *State v. Caraballo*, 198 So.3d 819 (Fla. 2d 2018).

the communication may be more likely to be protected from interception by the provisions in ch. 934, F.S.

Case Law, Legislative Creation of Exception

In *McDade v. State*,⁵ a 2014 case before the Florida Supreme Court, the court decided that it was an error to receive into evidence at McDade's criminal trial recordings that his stepdaughter surreptitiously made when she was 16 years-old.

The recordings, which contained conversations between McDade and his stepdaughter in McDade's bedroom, were introduced at McDade's trial for various crimes involving sexual abuse of his stepdaughter. The recorded conversations included statements by McDade that supported his stepdaughter's testimony at trial that McDade had sexually abused her. McDade had objected to their introduction.

The question before the court in *McDade v. State*⁶ was whether a *recording of solicitation and confirmation of child sexual abuse surreptitiously made by the child victim in the accused's bedroom* falls within the oral communication protections of ch. 934, F.S.

In late 2014, the court found that none of the exceptions to the prohibitions against the recording applied.⁷ The court further concluded that the facts surrounding the conversations and the recording of those conversations indicated the recordings were prohibited and inadmissible under ch. 934, F.S.⁸

Soon after the *McDade* decision, in 2015, the Legislature passed the exception now found in s. 934.03(2)(k), F.S. It is *lawful*:

- For a child under 18 years of age to intercept and record an oral communication;
- If the child is a party to the communication and has reasonable grounds to believe that;
- Recording the communication 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 an unlawful act of physical force or violence against the child.

III. Effect of Proposed Changes:

The bill creates a new exception to the prohibition located in s. 934.03(1), F.S., against a person intentionally intercepting, endeavoring to intercept, or procuring any other person to intercept or endeavor to intercept any wire, oral, or electronic communication.

⁵ 154 So.3d 292(Fla. 2014).

⁶ *Id.*

⁷ McDade did not consent to the conversations being recorded, and none of the other exceptions listed in s. 934.03(2), F.S., apply. *Id.* at 298.

⁸ "The facts related to the recorded conversations support the conclusion that McDade's statements were 'uttered by a person exhibiting an expectation that [his] communication [was] not subject to interception' and that McDade made those statements 'under circumstances justifying' his expectation that his statements would not be recorded. § 934.02(2), Fla. Stat. (2010). The recordings were made surreptitiously. McDade did not consent to the conversations being recorded ...The recordings, therefore, were prohibited. Because the recordings impermissibly intercepted oral communications, the recordings are inadmissible under section 934.06, Florida Statutes (2010)." *Id.* at 298.

The exception allows a parent or legal guardian of a child who is younger than 18 years of age to intercept and record an oral communication if the child is a party to the communication and the parent or guardian has reasonable grounds to believe that recording the communication 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 an unlawful act of physical force or violence against the child.

This exception differs from the similar exception in current law.⁹ The bill does not require the party who is recording the oral communication (a parent or legal guardian) be a party to the communication being intercepted and recorded.

A recording authorized by the bill which captures a statement by a party that the party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against a child:

- Must be provided to a law enforcement agency and
- May be used for the purpose of evidencing the intent to commit or the commission of a crime specified in the bill against a child.

Additionally, the bill prohibits the sharing or dissemination of a recording authorized by the bill except as expressly authorized by the bill.

The bill is effective upon becoming a law.

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 identified.

⁹ Section 934.03(2)(k), F.S. See also s. 934.03(2)(l), F.S.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 934.03 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.