

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 921 Electronic Crimes

SPONSOR(S): Criminal Justice & Public Safety Subcommittee, Snyder and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1850

FINAL HOUSE FLOOR ACTION: 116 Y's

0 N's

GOVERNOR'S ACTION: Pending

SUMMARY ANALYSIS

CS/HB 921 passed the House on April 1, 2021. The bill was amended in the Senate on April 27, 2021, and returned to the House. The House concurred in the Senate amendment and subsequently passed the bill as amended on April 28, 2021.

Section 836.10, F.S., provides a person commits a second degree felony if the person:

- Writes or composes and sends a letter, inscribed communication, or electronic communication to any person containing a threat to kill or to do bodily injury to the person to whom such letter or communication is sent, or to any member of the person's family; or
- Makes, posts, or transmits a threat in a writing or other record, to conduct a mass shooting or an act of terrorism, in any manner that would allow another person to view the threat.

Section 784.048, F.S., provides a person commits cyberstalking if he or she engages in a course of conduct that communicates, or causes to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, that causes that person substantial emotional distress and serves no legitimate purpose.

With the increasing use of social media, prosecutors have had difficulty in pursuing cases involving written threats or cyberstalking where communications were not sent directly to the victim. For example, a Twitter user can post a "tweet" to the general public that can be read and reasonably interpreted by someone viewing the tweet as a legitimate threat that causes a person substantial emotional distress. Additionally, the lack of a statutory definition of "electronic communication" or "electronic record" in current law creates uncertainty as to whether a threat communicated over mobile apps that allow a user to communicate using a mixture of text, video, and audio, such as Tik Tok or Snapchat, can be a basis for prosecution under the existing statute.

CS/HB 921 modernizes the crime of written threats to reflect the manner in which many people currently communicate. The bill amends s. 836.10, F.S., to prohibit a person from sending, posting, or transmitting, or procuring the sending, posting, or transmission of, a writing or other record, including an electronic record, in any manner by which it may be viewed by another person, when in such writing or record the person makes a threat to kill or do bodily harm to another person, or to conduct a mass shooting or an act of terrorism. The bill expands the scope of current law to also criminalize 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.

The bill defines an "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 amends s. 784.048, F.S., to provide that a person commits cyberstalking if he or she engages in a course of conduct that communicates, or causes to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication, directed at or pertaining to a specific person that causes that person substantial emotional distress and serves no legitimate purpose. The bill clarifies that social media posts and communications to third parties can serve as the basis for a cyberstalking conviction or injunction.

The bill may have a positive indeterminate impact on prison beds and jail beds by expanding the scope of the existing prohibition against written threats and cyberstalking to include additional electronic communications.

Subject to the Governor's veto powers, the effective date of this bill is October 1, 2021.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Modern Communication

In the early years of the Internet, people communicated electronically using email and instant messaging to directly communicate with another person or group of people. These methods of communication are roughly analogous to written communication that was contemplated when s. 836.10, F.S., was originally enacted. With the rise of social media, online communication has shifted from being primarily an exclusive interaction from one person to another, to a communication that is placed on the Internet and available for viewing by either a person, a group of people, or the entire online community. Additionally, online communication is no longer exclusively made using written text. The most popular social media apps, such as Tik Tok, Instagram, and Snapchat, use a mixture of video, audio, and text to communicate a message to a potentially vast audience.

Criminal Threats

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 kill or do bodily harm are not protected under the United States 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 If the prosecution demonstrates that a defendant’s communication was sufficient to cause alarm in a reasonable person, the jury makes the determination as to the reasonableness of the victim’s interpretation of the communication and whether the communication is a “true threat” and subject to criminal punishment.⁴

Written Threats

Current Florida law prohibits specified written threats. Under s. 836.10, F.S., it is a second degree felony⁵ to:

- Write or compose and send a letter, inscribed communication, or electronic communication to any person containing 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 to do bodily injury to any family member of the person to whom such letter or communication is sent; or
- Make, post, or transmit 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.⁶

For a written threat to be considered “sent”, the communication must be deposited in the mail or by some other form of delivery, and be received by the person being threatened or by a family member of the person being threatened.⁷

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 *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1076-77 (9th Cir. 2002) (holding that a true threat is “a statement which, in the entire context and under all the circumstances, a reasonable person would foresee the statement would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.”).

⁴ *Puy v. State*, 294 So. 3d 940 (Fla. 4th DCA 2020), see also *State v. Cowart*, 301 So. 3d 332 (Fla. 5th DCA 2020).

⁵ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

⁶ S. 836.10, F.S.

⁷ *O’Leary v. State*, 109 So. 3d 874, 876 (Fla. 1st DCA 2013).

In 2010, the Legislature criminalized threats made by “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.⁸ In a 2016 court decision, the Second District Court of Appeal emphasized the difficulties in applying a statute originally drafted to prohibit threats written on physical paper in an environment where the majority of communication takes place electronically.⁹ In *J.A.W. v. State*, the court overturned a juvenile’s disposition under s. 836.10, F.S., for posting written threats to kill or do bodily injury on Twitter.¹⁰ The juvenile made a series of public posts on Twitter over the span of several days threatening to “shoot up” his school. The tweets were discovered by an out-of-state watchdog group who reported the threats to local police. Local police later contacted school officials informing them of the threats.¹¹

The court found that because the juvenile publicly posted the tweets, rather than directly sending them to any student or school official, the receipt of the threats by school officials through local police was too far removed to support a conviction under s. 836.10, F.S. 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.¹²

In 2018, the Legislature amended s. 836.10, F.S., again to respond to evolving methods of electronic communication. To capture circumstances involving a threat made to a group of people, the Legislature removed the statutory requirement that a threat had to be communicated directly to a specific person in instances where the threat involves a mass shooting or act of terrorism.¹³ 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 was once again retained.

Cyberstalking

Cyberstalking means:

- A course of conduct¹⁴ that communicates, or causes to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, that causes that person substantial emotional distress and serves no legitimate purpose, or
- To access, or attempt to access, the online accounts or Internet-connected home electronic systems of another person without that person’s permission which causes that person substantial emotional distress and serves no legitimate purpose.¹⁵

A person who willfully, maliciously, and repeatedly cyberstalks another person commits a first degree misdemeanor.^{16,17} A person commits a third degree felony¹⁸ for cyberstalking when he or she also:

- Makes a credible threat against the victim;
- Is subject to a court-ordered prohibition of contact with the victim, such as an injunction;

⁸ Ch. 2010-51, Laws of Fla.

⁹ *J.A.W. v. State*, 210 So. 3d 142 (Fla. 2d DCA 2016).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 146.

¹³ In 2018 the Legislature amended s. 836.10, F.S., to exempt from liability a provider of an interactive computer service, communications services as defined in s. 202.11, F.S., a commercial mobile service, or an information service, including, but not limited to, an Internet service provider or a hosting service provider, if it provides the transmission, storage, or caching of electronic communications or messages of others or provides another related telecommunications service, commercial mobile radio service, or information service for use by a person who violates this section. See s. 836.10(2), F.S.

¹⁴ “Course of conduct” means a series of acts over a period of time, however short, evidencing continuity of purpose. S. 746.048(1)(b), F.S.

¹⁵ S. 784.048(1)(d), F.S.

¹⁶ S. 784.0048(2), F.S.

¹⁷ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

¹⁸ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

- Cyberstalks a victim younger than 16; or
- Has a prior conviction for certain sexual offenses and cyberstalks the victim of that offense in violation of a no contact order.¹⁹

Similar to the prohibition on written threats, Florida courts have reached different conclusions when applying the crime of cyberstalking to modern methods of communication. District Courts of Appeal are split on whether social media posts can serve as the basis for a cyberstalking conviction or injunction because of difficulty in determining whether a social media post is “directed at a specific person.”²⁰ In a recent en banc decision, the Fourth District Court of Appeal attempted to harmonize these decisions by holding that social media posts can be “directed at a specific person” if the posts are made to a third party but contain sufficient information to identify the target of the posts, or such posts are reasonably likely to be seen by the target.²¹

Criminal Punishment Code - Offense Severity Ranking Chart

Felony offenses subject to the Criminal Punishment Code²² are listed in a single offense severity ranking chart (OSRC), which uses 10 offense levels to rank felonies from least severe (level 1) to most severe (level 10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute.²³ A person’s primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense.²⁴ A person may also accumulate points for factors such as victim injury, violating a community sanction, and certain sentencing multipliers.²⁵ The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.²⁶ Written threats to kill or to do bodily injury or to conduct a mass shooting or an act of terrorism, and felony cyberstalking are currently ranked as a Level 6 offenses on the OSRC.

Effect of the Bill

Criminal Threats

CS/HB 921 modernizes the crime of written threats to reflect the manner in which many people currently communicate. The bill amends s. 836.10, F.S., to prohibit a person from sending, posting, or transmitting, or procuring the sending, posting, or transmission of, a writing or other record, including an electronic record, in any manner in which it can viewed by another person, when in such writing or record the person makes a threat to:

- Kill or 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. 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. This definition encompasses the blended forms of media and multiple communication platforms people currently use to communicate.

¹⁹ S. 784.048(3), (4), (5), and (7), F.S.

²⁰ See *Horowitz v. Horowitz*, 160 So. 3d 530 (Fla. 2d DCA 2015), *Chevaldina v. R.K./FL Mgmt., Inc.*, (Fla. 3d DCA 2014), *Scott v. Blum*, 191 So. 3d 502 (Fla. 2d DCA 2014).

²¹ *Logue v. Book*, 297 So. 3d 605, 612 (Fla. 4th DCA 2020).

²² All felony offenses, other than capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

²³ S. 921.0022, F.S.

²⁴ Ss. 921.0022 and 921.0024, F.S.

²⁵ S. 921.0024(2), F.S.

²⁶ *Id.*

Although the bill encompasses a broader range of electronic communications and no longer requires the threat be sent directly to the subject of a threat, the bill does not change existing case law that limits criminal prosecution of threats to those threats that are intentionally or knowingly made, and that are sufficient to cause alarm in a reasonable person. Under the bill, to convict a defendant of making a threat, a prosecutor would still be required to convince a jury that the victim's interpretation of the threat was reasonable.

The bill leaves the criminal penalty for making a threat unchanged as a second degree felony, ranked as a Level 6 offense on the OSRC. The bill retains the exemption from liability for internet service providers and communications services providers.

Cyberstalking

The bill amends s. 784.048, F.S., to provide that a person commits cyberstalking if he or she engages in a course of conduct that communicates, or causes to be communicated, directly or indirectly, words, images, or language by or through the use of electronic mail or electronic communication, directed at or pertaining to a specific person that causes that person substantial emotional distress and serves no legitimate purpose. The bill clarifies that social media posts and communications to third parties can serve as the basis for a cyberstalking conviction or injunction.

Subject to the Governor's veto powers, the effective date of this bill is October 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on prison beds by expanding the scope of the existing written threats offense to include additional communications.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on jail beds by expanding the scope of cyberstalking to include additional communications.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

