

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 797 Search and Seizure of Portable Electronic Device

**SPONSOR(S):** Civil Justice Subcommittee

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 846

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Keegan	Bond

### SUMMARY ANALYSIS

Current Florida and Federal law provide protections against unreasonable search and seizure under the Fourth Amendment to the United States Constitution. A lawful search of an individual's person or property can only be conducted after a magistrate has issued a search warrant based on probable cause, or when a lawful exception to the search warrant requirement exists.

The bill specifies that the contents and communications of a portable electronic device (PED), including but not limited to, data or information contained in or transmitted from the PED, are not subject to a search or seizure by a law enforcement agency or other governmental entity except pursuant to a warrant. The bill provides a number of exceptions to the general prohibition against searching portable electronic devices without a warrant.

The bill also prohibits a government entity from obtaining location information of an electronic device for the purpose of continuously or periodically tracking an individual without first securing a valid warrant. The bill provides a number of exceptions to the general prohibition against obtaining tracking or location information without a warrant.

The bill does not appear to have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2013.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Federal Search and Seizure**

The Fourth Amendment to the United States Constitution (“Fourth Amendment”) protects individuals from unreasonable search and seizure.<sup>1</sup> The text of the Fourth Amendment provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>2</sup>

A “search” generally occurs when a state actor infringes on an expectation of privacy that society considers to be reasonable.<sup>3</sup> The language of the Fourth Amendment exhibits a strong preference for conducting searches after securing a valid warrant,<sup>4</sup> however, a number of exceptions to the warrant requirement exist.<sup>5</sup> These exceptions are usually hallmarked by circumstances which make a warrant impractical, impossible, or unreasonable to obtain prior to conducting a search or seizure.

A common exception to the warrant requirement is the exigent circumstances exception, which allows a warrantless search under circumstances where the safety or property of officers or the public is threatened.<sup>6</sup> “An entry may be justified by hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect’s escape, or the risk of danger to the police or others.”<sup>7</sup>

The search incident to arrest is an exception to the warrant requirement that arises out of the same safety-oriented logic that forms the basis for the exigent circumstances exception.<sup>8</sup> The United States Supreme Court has long recognized the exception to the warrant requirement for searches incident to arrest.<sup>9</sup> However, the Court has broadened this exception over time from the narrowly-tailored exception described in *Trupiano v. United States*,<sup>10</sup> to the broader exception described in *Chimel v. California*.<sup>11</sup> The Court in *Chimel* held that regardless of whether any additional exigency exists, “[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons... [and] to search for and seize any evidence.” The Court continued to say a search incident to arrest may include searching the arrestee’s person as well as any nearby area where the arrestee could have grabbed a weapon or evidence.<sup>12</sup>

Currently, two separate lines of constitutional analysis may permit warrantless searches of cell phones and other portable electronic devices (“PEDs”) incident to arrest. Some courts evaluate PEDs as a type of container, that in many circumstances may be searched incident to arrest, along with other containers found on the arrestee’s person or in the arrestee’s car.<sup>13</sup> The second line of analysis evaluates searches of PEDs based on whether they contain evidence of the crime for which the person

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<sup>1</sup> *Arizona v. Hicks*, 480 U.S. 321 (1987); *U.S. v. Jacobsen*, 466 U.S. 109 (1983).

<sup>2</sup> U.S. CONST. amend. IV.

<sup>3</sup> *U.S. v. Jacobsen*, 466 U.S. 109 (1983); *U.S. v. Maple*, 348 F.3d 260 (D.C. Cir. 2003); *Fraternal Order of Police Montgomery County Lodge 35, Inc. v. Manger*, 929 A.2d 958 (Ct. Spec. App. M.D. 2007).

<sup>4</sup> *Ornelas v. U.S.*, 517 U.S. 690 (1996).

<sup>5</sup> *Donovan v. Dewey*, 452 U.S. 594 (1981).

<sup>6</sup> *Minnesota v. Olson*, 495 U.S. 91 (1990).

<sup>7</sup> *Id.* at 91.

<sup>8</sup> *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>9</sup> *Trupiano v. United States*, 334 U.S. 699 (1948).

<sup>10</sup> The Court described the exception as “a strictly limited right” of law enforcement officers, and further explained that the exception does not exist simply on the basis that an arrest has been affected. *Trupiano* at 708.

<sup>11</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969).

<sup>12</sup> *Id.*

<sup>13</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969); *Davis v. United States*, 131 S.Ct. 2419 (2011).

is being arrested. *Chimel* established the rule that a search incident to arrest may be made for the purpose of collecting evidence of the crime for which the person is being arrested, and that a search that reasonably will reveal evidence of the crime is permissible under this doctrine.<sup>14</sup> Some years later, in *United States v. Robinson*, the Court clarified its holding in *Chimel*, explaining that while safety and preserving evidence are the rationales underlying the search incident to arrest, once a lawful arrest is affected, no additional justification is needed to perform a search of the arrestee's person.<sup>15</sup>

### Florida Search and Seizure

Article I, Section 12 of the Florida Constitution provides protection against unreasonable search and seizure in a manner similar to the Fourth Amendment; however Section 12 provides additional protection for private communications. Section 12 specifically provides, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated."<sup>16</sup> Section 12 also specifies that "Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution." Florida courts consistently hold that Section 12 binds these courts to render decisions in accordance with United States Supreme Court Precedent on the Fourth Amendment.<sup>17</sup>

Current law allows law enforcement officers to conduct a search of a PED, such as a cell phone, after securing a valid search warrant or when an exception to the search warrant requirement exists.<sup>18</sup> The Florida Supreme Court recently heard oral arguments in *Smallwood v. State*<sup>19</sup> to decide whether the United Supreme Court holding in *United States v. Robinson* will allow a police officer to search an arrestee's cell phone found on the arrestee's person, regardless of whether the cell phone is likely to contain evidence of any crime.<sup>20</sup> The Florida Supreme Court has not yet rendered an opinion in this case.

### Florida Security of Communications

Currently, Chapter 934, F.S., governs the security of electronic and telephonic communications. The law covers a number of different investigative and monitoring procedures, including wiretapping, obtaining service provider records, and mobile tracking devices, among others.

Law enforcement officers are currently authorized to acquire service providers' records for PEDs on the provider's network after securing a court order issued under s. 934.23(5), F.S.<sup>21</sup> In order to obtain this court order, the law enforcement officer is required to offer "specific and articulable facts showing that there are reasonable grounds to believe the contents of a wire or electronic communication or the records of other information sought are relevant and material to an ongoing criminal investigation."<sup>22</sup> The showing of "specific and articulable facts" required in s. 934.23(5), F.S., is a lower standard than the probable cause standard<sup>23</sup> required for obtaining a lawful warrant.

Law enforcement officers are also authorized to install mobile tracking devices for the purpose of collecting tracking and location information after a court order is issued under s. 934.42(2), F.S. In order to obtain this court order, the law enforcement officer is required to provide a statement to the court "that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the investigating agency."<sup>24</sup> A certification of relevance is a lower standard than the probable cause standard required for obtaining a lawful warrant.

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<sup>14</sup> *Chimel* at 763.

<sup>15</sup> *United States v. Robinson*, 414 U.S. 218, 235-36 (1973).

<sup>16</sup> FLA. CONST. art. I, § 12.

<sup>17</sup> *State v. Lavazzoli*, 434 So.2d 321 (Fla.1983); *Smallwood v. State*, 61 So.3d 448 (Fla. 2011).

<sup>18</sup> *Smallwood v. State*, 61 So.3d 448 (Fla. 1<sup>st</sup> DCA 2011); *State v. Glasco*, 90 So.3d 905 (Fla. 5<sup>th</sup> DCA 2012).

<sup>19</sup> *Smallwood v. State*, 68 So.3d 235 (Fla. 2011).

<sup>20</sup> Brief for Petitioner-Appellant, *Smallwood v. State*, 68 So.3d 235 (Fla. 2011).

<sup>21</sup> *Mitchell v. State*, 25 So.3d 632 (Fla. 4<sup>th</sup> DCA 2009).

<sup>22</sup> Section 934.23(5), F.S.

<sup>23</sup> *Tracey v. State*, 69 So.3d 992, 998 (Fla. 4<sup>th</sup> DCA 2011).

<sup>24</sup> Section 934.42(2)(b).

## **Effect of the Bill**

### Searches of Portable Electronic Devices

The bill creates s. 933.31, F.S., which prohibits a governmental entity from searching a PED without first securing a valid search warrant. The bill provides the following legislative findings and intent:

- The number of residents of this state using and carrying portable electronic devices is growing at a rapidly increasing rate. These devices can store, and do encourage the storing of, an almost limitless amount of personal and private information. Commonly linked to the Internet, these devices are used to access personal and business information and databases in computers and servers that are located anywhere in the world. A user of a portable electronic device has a reasonable and justifiable expectation of privacy in the information that these devices contain and can access through the Internet.
- The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated.
- No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.
- The intrusion on the privacy of information and the freedom of communication of any person who is arrested is of such enormity that the officer who makes the arrest must obtain a warrant to search the information contained in, or accessed through, the arrested person's portable electronic device, such as a cellular telephone.
- It is the intent of the Legislature that this section prohibit the search of information contained in a portable electronic device, as defined in this section, by a law enforcement agency or other governmental entity at any time except pursuant to a warrant issued by a duly authorized judicial officer using established procedures.

The bill provides the following definitions:

- "Government entity" means a state or local agency, including, but not limited to, a law enforcement entity or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for or on behalf of a state or local agency.
- "Portable electronic device" means an object capable of being easily transported or conveyed by a person which is capable of creating, receiving, accessing, or storing electronic data or communications and that communicates with, by any means, another entity or individual.

The bill specifies that the contents and communications of a PED, including but not limited to, data or information contained in or transmitted from the PED, are not subject to a search by a law enforcement agency or other government entity except pursuant to a warrant issued by a duly authorized judicial officer. The bill creates exceptions to the statutory warrant requirement, which include:

- Circumstances that present a lawful exception to the warrant requirement, other than search incident to arrest;
- Searches of transponders used to assess or collect tolls;
- Searches when the governmental entity reasonably believes that an emergency involving immediate danger of death or serious bodily harm requires the search or seizure, without delay, of the contents of the PED concerning a specified person or persons, and when a warrant cannot be obtained in time to prevent the danger, or when the possessor of the PED believes that an emergency involves the danger of death; and
- Law enforcement action to disable a PED or its access to wireless communication pending a lawful search warrant.

The bill requires the governmental entity seeking the contents of a PED to file a written statement with the court setting forth the facts giving rise to the emergency and the facts as to why the person or persons whose PED contents were sought are believed to be important in addressing the emergency. This statement must be filed within 48 hours after seeking the disclosure. The bill specifies that private entities providing electronic communications services are not responsible for ensuring that governmental entities comply with the above requirements.

### Location Information Tracking

The bill also creates s. 933.32, F.S., which prohibits a governmental entity from obtaining location information of an electronic device without first securing a valid warrant. The bill provides the following legislative findings and intent:

- The Legislature finds that existing law authorizes a court to issue a warrant for the search of a place and the seizure of property or things identified in the warrant when there is probable cause to believe that specified grounds exist. The Legislature also finds that existing law provides for a warrant procedure for the acquisition of stored communications in the possession of a provider of electronic communication service or a remote computing service.
- It is the intent of the Legislature to prohibit a government entity from obtaining the location information of an electronic device without a valid search warrant issued by a duly authorized judicial officer unless certain exceptions apply, including in an emergency or when requested by the owner of the device. However, it is also the intent of the Legislature that this bill, with certain exceptions, prohibits the use of information obtained in violation of this section in a civil or administrative hearing.

The bill provides the following definitions:

- "Electronic communication service" means a service that provides to its users the ability to send or receive wire or electronic communications;
- "Government entity" means a state or local agency, including, but not limited to, a law enforcement entity or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for or on behalf of a state or local agency;
- "Location information" means information, concerning the location of an electronic device, including both the current location and any previous location of the device, that, in whole or in part, is generated, derived from, or obtained by the operation of an electronic device;
- "Location information service" means the provision of a global positioning service or other mapping, locational, or directional information service;
- "Owner" means the person or entity recognized by the law as having the legal title, claim, or right to an electronic device;
- "Portable electronic device" means an object capable of being easily transported or conveyed by a person which is capable of creating, receiving, accessing, or storing electronic data or communications and that communicates with, by any means, another entity or individual;
- "Remote computing service" means the provision of computer storage or processing services by means of an electronic communications system; and
- "User" means a person or entity that uses an electronic device.

The bill prohibits a law enforcement agency or other governmental entity from obtaining the location information of an electronic device for the purpose of continuously or periodically tracking an individual without a valid search warrant issued by a duly authorized judicial officer. Such warrant may not be issued for a period of time longer than is necessary to achieve the objective of the authorization, and in no instance for longer than 30 days.<sup>25</sup> Extensions of the warrant may be granted, but only upon a judge finding continuing probable cause and that the extension is necessary to achieve the objective of the authorization. A warrant cannot be extended any longer than the judge deems necessary to achieve the purposes for which the warrant was originally granted, and in no instance for longer than 30 days.

The bill allows a governmental entity to obtain location information without a warrant if disclosure of such information is not prohibited by federal law and in the following circumstances:

- Where a lawful exception to the warrant requirement exists;
- Searches made incident to national security;
- Searches for a missing child less than 18 years of age;
- Transponders used to assess or collect tolls;
- In order to respond to the user's call for emergency services;

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<sup>25</sup> Commencing on the day the location information is initially obtained, or 10 days after the issuance of the warrant, whichever comes first.

- With the informed consent of the owner or user of the electronic device, provided that the owner or user may not consent to the disclosure of location information if the device is known or believed to be in the possession of, or attached to a possession of, a third party known to the owner or user, unless that third party is less than 18 years of age;<sup>26</sup>
- With the informed, affirmative consent of the legal guardian or next of kin of the electronic device's user, if the user is believed to be deceased or has been reported missing and unable to be contacted; and
- If the governmental entity reasonably believes that an emergency involving immediate danger of death or serious physical injury to a person requires the disclosure, without delay, of location information concerning a specific person or persons and that a warrant cannot be obtained in time to prevent the identified danger and the possessor of the location information, in good faith, believes that an emergency involving danger of death or serious physical injury to a person requires the disclosure without delay.

The governmental entity seeking the location information must file with the appropriate court a written statement setting forth the facts giving rise to the emergency and the facts as to why the person or persons whose location information was sought are believed to be important in addressing the emergency, no later than 48 hours after seeking disclosure.

The bill specifies that private entities providing electronic communications services are not responsible for ensuring that government entities comply with the above requirements. Additionally, the prohibitions relating to location information do not create a cause of action against any foreign or Florida private entity, its officers, employees, agents, or other specified persons, for providing location information.

#### B. SECTION DIRECTORY:

Section 1. Creates s. 933.31, F.S., relating to portable electronic device; prohibited search and seizure.

Section 2. Creates s. 933.32, F.S., relating to location informational tracking; prohibited search and seizure.

Section 3. Provides an effective date of July 1, 2013.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

This bill does not appear to have an impact on state revenues.

##### 2. Expenditures:

This bill does not appear to have an impact on state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

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<sup>26</sup> The informed, affirmative consent of the owner or user of the electronic device concerned may not be used as consent to disclose the location information of another portable electronic device that may be remotely linked or connected to the owner or user of the portable electronic device concerned.

This bill does not appear to have an impact on local government revenues.

2. Expenditures:

This bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a