

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CRJS 15-01 Recording Oral Communications

SPONSOR(S): Criminal Justice Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:** HB 131, SB 218

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Cunningham	Cunningham

SUMMARY ANALYSIS

Section 934.03, F.S., makes it a third degree felony for a person to intentionally intercept an oral communication. The statute sets forth a variety of exceptions to this prohibition. For example:

- It is not a crime for a person to intercept an oral communication if all parties to the communication consent to the interception; and
- A law enforcement officer or a person acting under the direction of a law enforcement officer may intercept an oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

Oral communications that have been intercepted illegally cannot be used as 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.

In *McDade v. State*, a 16-year old girl secretly recorded conversations with her step-father that confirmed that he had sexually abused her. The trial court admitted these recordings into evidence, and the defendant was convicted. On appeal, the 2nd District Court of Appeal affirmed the trial court's decision to admit the recordings into evidence. The Florida Supreme Court disagreed and held that because the recordings impermissibly intercepted oral communications, they were inadmissible as evidence. However, the court stated the following:

It may well be that a compelling case can be made for an exception from chapter 934's statutory exclusionary rule for recordings that provide evidence of criminal activity – or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature.

The bill amends s. 934.03, F.S., to create an additional exception to the prohibition on intercepting oral communications. The bill makes it lawful for a person to intercept and record an oral communication if:

- The person is a party to the communication; and
- Has reasonable grounds to believe that the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful act of physical force or violence against a person.

The bill creates an additional exception to the prohibitions found in s. 934.03, F.S., violations of which are a third degree felony. To the extent this results in fewer people being convicted for violating s. 934.03, F.S., the bill may have a positive prison bed impact.

The bill is effective July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Section 934.03, F.S., makes it a third degree felony¹ for a person to intentionally intercept² an oral communication.³ The statute sets forth a variety of exceptions to this prohibition. For example:

- It is not a crime for a person to intercept an oral communication if all parties to the communication consent to the interception;⁴ and
- A law enforcement officer or a person acting under the direction of a law enforcement officer may intercept an oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.⁵

Oral communications that have been intercepted illegally cannot be used as 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.⁶

In *McDade v. State*,⁷ a 16-year old girl secretly recorded conversations with her step-father that confirmed that he had sexually abused her. The trial court admitted these recordings into evidence, and the defendant was convicted. On appeal, the 2nd District Court of Appeal affirmed the trial court's decision to admit the recordings into evidence reasoning that the defendant did not have an expectation of privacy in the communication that "society was prepared to accept as reasonable."⁸ After examining the plain language of the prohibitions in s. 934.03, F.S., the Florida Supreme Court disagreed and held that because the recordings impermissibly intercepted oral communications, they were inadmissible as evidence.⁹ However, the court stated the following:

It may well be that a compelling case can be made for an exception from chapter 934's statutory exclusionary rule for recordings that provide evidence of criminal activity – or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature.¹⁰

Effect of the Bill

The bill amends s. 934.03, F.S., to create an additional exception to the prohibition on intercepting oral communications. The bill makes it lawful for a person to intercept and record an oral communication if:

- The person is a party to the communication; and
- Has reasonable grounds to believe that the recording will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful act of physical force or violence against a person.

B. SECTION DIRECTORY:

¹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

² Section 934.02, F.S., defines "intercept" as the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

³ Section 934.02, F.S., defines "oral communication" as any 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.

⁴ Section 934.03(2)(d), F.S. As of August 2012, Florida was one of 12 states that required the consent of all parties (rather than one party) to a communication to consent in order for interception to be lawful. Reporters Committee for Freedom of the Press, *Reporter's Recording Guide - A State-by-State Guide to Taping Phone Calls and In-Person Conversations*, August 1, 2012, <http://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf> (last accessed on January 22, 2015).

⁵ Section 934.03(2)(c), F.S.

⁶ Section 934.06, F.S.

⁷ 2014 WL 6977944 (Fla. 2014).

⁸ *McDade v. State*, 2014 WL 6977944 (Fla. 2014)(citing *McDade v. State*, 114 So.3d 465 at 470 [Fla. 2d DCA 2013]).

⁹ *McDade v. State*, 2014 WL 6977944 (Fla. 2014).

¹⁰ *Id.*

Section 1. Amends s. 934.03, F.S., relating to interception and disclosure of wire, oral, or electronic communications prohibited.

Section 2. Provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill creates an additional exception to the prohibitions found in s. 934.03, F.S., violations of which are a third degree felony. To the extent this results in fewer people being arrested for violating s. 934.03, F.S., the bill may have a positive prison bed impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any 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 appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The 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