

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 284
SPONSOR: Communication and Public Utilities Committee and Senator Aronberg
SUBJECT: Video Voyeurism
DATE: March 15, 2004 REVISED: 03/17/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	<u>Fav/CS</u>
2.	<u>Kruse</u>	<u>Maclure</u>	<u>CM</u>	<u>Fav/1 amendment</u>
3.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/2 amendments</u>
4.	_____	_____	<u>JU</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 284 creates the crimes of, and penalties for, video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination. The committee substitute provides definitions and also creates exemptions from these provisions. It amends the Florida Contraband Forfeiture Act to include imaging devices and images recorded in violation of the video voyeurism provisions and to provide for the destruction of such forfeited articles. The committee substitute also reenacts multiple statute subsections with cross-references to a definition revised by the committee substitute to ensure the cross-references are up-to-date if the committee substitute becomes law.

The committee substitute creates section 810.145, Florida Statutes, and substantially amends the following sections of the Florida Statutes: 932.701 and 932.7055.

II. Present Situation:

Video Surveillance and Voyeurism

The use of video surveillance for legitimate and illegitimate purposes has increased significantly in the United States.

More than sixty metropolitan areas in the United States use video surveillance in public areas for law enforcement purposes--as a means of apprehending criminals after-the-fact and for crime prevention. Cameras are also increasingly used in the workplace to monitor employee productivity, to deter theft, and to enhance workplace security. In addition, cameras are now common in retail establishments to assist in loss prevention and customer safety. ... In short, both the number of

cameras and the diversity of uses have multiplied exponentially since the technology was first introduced.¹

The illegitimate use of video surveillance has also grown with advancements in technology. Other states have addressed the proliferation of video surveillance for illegitimate purposes through passage of video voyeurism laws. The state of New York, based on an incident where a landlord observed one of his tenants over several months through a tiny camera in a smoke detector, passed “Stephanie’s Law,” which criminalizes this behavior. Like other states’ video voyeurism laws, New York’s law is applied to a defendant when the person under surveillance had a reasonable expectation of privacy and had not consented to such surveillance.²

In Florida, s. 810.14, F.S., which establishes the crime of voyeurism, addresses the illegitimate use of video surveillance. The crime of voyeurism occurs when a person, “with lewd, lascivious, or indecent intent, secretly observes, photographs, films, videotapes, or records another person when such other person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy.”³ The phrase “reasonable expectation of privacy” is not defined in this section.

A violation is a first-degree misdemeanor, punishable by a definite term of imprisonment not exceeding one year or by a fine of not more than \$1,000.⁴ If a person who violates this section has been previously convicted or adjudicated delinquent two or more times of any violation of this section, the subsequent violation is a third-degree felony, punishable by a term of imprisonment not exceeding five years, by a fine of not more than \$5,000, or by a term of imprisonment not exceeding 10 years for certain violent or habitual offenders.⁵ A person has been previously convicted or adjudicated delinquent of a violation of this section if the violation resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense.⁶

Forfeiture

If the state proves that certain items in a defendant’s possession have a connection to criminal activity, those items may be forfeited to the state. Section 932.701, F.S., the Florida Contraband Forfeiture Act, provides the authority for such forfeiture. The act allows for the seizure and forfeiture by an agency of “contraband articles,” which may include controlled substances, gambling paraphernalia, personal property such as a vessel or aircraft, or real property.⁷

Section 932.7055, F.S., establishes the procedures an agency must follow once contraband articles have been forfeited to an agency. Among other things, an agency may choose to retain

¹ Robert D. Bickel, Susan Brinkley, and Wendy White, *Seeing Past Privacy: Will the Development and Application of CCTV and Other Video Security Technology Compromise an Essential Constitutional Right in a Democracy, or Will the Courts Strike a Balance?*, 33 Stetson L. Rev. 299, 305-306 (2003).

² Stephanie’s Law, ch. 69, Laws of New York, 2003.

³ Section 810.14(1), F.S.

⁴ *Id.* at (2).

⁵ *Id.* at (3).

⁶ *Id.* at (4).

⁷ Section 932.701(2)(a)1., 2., 5., & 6., F.S.

the property, sell the property, or salvage, trade, or transfer the property to a public or nonprofit organization.⁸

III. **Effect of Proposed Changes:**

Committee Substitute for Senate Bill 284 creates the crimes of, and penalties for, video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination.

Section 1 creates s. 810.145, F.S., which establishes the crimes of video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination.

Video Voyeurism

A person commits the offense of video voyeurism if that person:

- for his or her own amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person, intentionally uses or installs an imaging device to secretly view, broadcast, or record a person, without that person's knowledge or consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy;
- for the amusement, entertainment, sexual arousal, gratification, or profit of another, or on behalf of another, intentionally permits the use or installation of an imaging device to secretly view, broadcast, or record a person, without that person's knowledge or consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy; or
- for the amusement, entertainment, sexual arousal, gratification, or profit of oneself or another, or on behalf of oneself or another, intentionally uses an imaging device to secretly view, broadcast, or record under or through the clothing being worn by another person, without that person's knowledge or consent, for the purpose of viewing the body of, or the undergarments worn by, that person.

Video Voyeurism Dissemination

A person commits the offense of video voyeurism dissemination if that person, knowing that an image was created in violation of the video voyeurism provisions, intentionally disseminates, distributes, or transfers the image to another person.

Commercial Video Voyeurism Dissemination

A person commits the offense of commercial video voyeurism dissemination if that person:

- knowing that an image was created in violation of the video voyeurism provisions, sells the image for consideration to another person; or

⁸ Section 932.7055(1)(a)-(c), F.S.

- having created the image in violation of the video voyeurism provisions, disseminates, distributes, or transfers the image to another person for that person to sell the image to others.

Definitions

The committee substitute defines the following:

- “Broadcast” means electronically transmitting a visual image with the intent that it be viewed by another person.
- “Imaging device” means any mechanical, digital, or electronic viewing device, still camera, camcorder, motion picture camera, or any other instrument, equipment, or format capable of recording, storing, or transmitting visual images of another person.
- “Place and time when a person has a reasonable expectation of privacy” means a place and time when a reasonable person would believe that he or she could fully disrobe in privacy, without being concerned that the person’s undressing was being viewed, recorded, or broadcasted by another, including, but not limited to, the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth.
- “Privately exposing the body” means exposing a sexual organ.

Exemptions and Penalties

The committee substitute exempts from its provisions any law enforcement agency conducting surveillance for a law enforcement purpose; a security system when a written notice is conspicuously posted on the premises stating that a video surveillance system has been installed for the purpose of security for the premises; a video surveillance device that is installed in such a manner that the presence of the device is clearly and immediately obvious; or dissemination, distribution, or transfer of images subject to this section by a provider of an electronic communication service.

A first violation is a first-degree misdemeanor, punishable by a definite term of imprisonment not exceeding one year or by a fine of not more than \$1,000. If a person who violates this section has been previously convicted or adjudicated delinquent two or more times of any violation of this section, it is a third-degree felony, punishable by a term of imprisonment not exceeding five years, by a fine of not more than \$5,000, or by a term of imprisonment not exceeding 10 years if the person is categorized as a habitual felony offender.

Section 2 amends s. 932.701, F.S., of the Florida Contraband Forfeiture Act. The committee substitute amends the definition of “contraband article” to include any personal property, including, but not limited to, any imaging device used in violation of s. 810.145, F.S. (the video voyeurism provisions created in section 1), or any photograph, film, or other recorded image, including an image recorded on videotape, a compact disk, digital tape, or fixed disk, recorded in violation of s. 810.145, F.S.

Section 3 amends s. 932.7055, F.S., regarding the disposition of liens and forfeited property. The committee substitute requires an agency that has received, through forfeiture, video voyeurism images made in violation of newly created s. 810.145, F.S., to destroy any image and the

medium upon which the image is recorded, including, but not limited to, a photograph, video tape, diskette, compact disk, or fixed disk. The agency may not sell or retain any image.

Section 4 amends s. 932.707, F.S., to conform a cross-reference to a section renumbering change made by the committee substitute.

Section 5 reenacts subsection (6) of s. 705.101, F.S., for the purpose of incorporating the amendment to the definition of “contraband article” made in the committee substitute. Section 705.101, F.S., defines “unclaimed evidence” and contains a cross-reference to the definition of “contraband article” provided in s. 932.701, F.S., which is amended in section 2 of this committee substitute. Reenacting subsection (6) will ensure the cross-reference in subsection (6) to the definition of “contraband article” reflects the change in the definition made by this committee substitute if the committee substitute becomes law.

Section 6 reenacts s. 932.703(4), F.S., for the purpose of incorporating the amendment to s. 932.701, F.S., made in this committee substitute. Section 932.703(4), F.S., provides that when possession of a contraband article constitutes a felony, the personal or real property on which the contraband article is located at the time of the seizure is also contraband and subject to seizure. It is presumed that the personal or real property was being used in a manner to facilitate the transportation, concealment, receipt, possession, or sale of the contraband article. This subsection also contains a cross-reference to the definition of “contraband article” provided in s. 932.701, F.S., which is amended in section 2 of this committee substitute.

Section 7 provides that the committee substitute takes effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

A statute in the state of Washington containing comparable provisions to those created by Committee Substitute for Senate Bill 284 was challenged on the grounds that it was unconstitutionally overbroad.⁹ The Washington Supreme Court acknowledged that a statute is overbroad if its prohibitions also capture constitutionally protected free speech. The court, however, found the statute was not overbroad because the court was able to

⁹ *State of Washington v. Glas*, 147 Wash. 2d 410, 54 P.3d 147 (Wash. 2002).

interpret the plain language of the statute without drawing in constitutionally protected free speech.¹⁰

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent this bill impacts such activity, and to the extent such activity is currently legal, those who profit from video voyeurism may have a decrease in income.

C. Government Sector Impact:

Since the number of possible prosecutions cannot be projected, the fiscal impact on the state law enforcement and court systems is indeterminable.

VI. Technical Deficiencies:

The committee substitute requires knowledge of the section of law it creates in order to be convicted of video voyeurism dissemination or of commercial video voyeurism dissemination. Criminal statutes usually do not require knowledge of the law to reach a conviction. The Legislature may wish to amend the committee substitute to revise those provisions. Additionally, for sentencing purposes, it is unclear what penalty should be applied to someone who violates the committee substitute's provisions for a second time. The Legislature may wish to amend the committee substitute to provide clarification.

VII. Related Issues:

A number of states, including Arkansas, Kentucky, Louisiana, New York, South Carolina, Utah, and Washington, have established a similar criminal statute. Additionally, a federal bill, SB 1301, the Video Voyeurism Prevention Act of 2003, is pending in Congress. This bill has passed the Senate and has been referred to a House committee.

VIII. Amendments:

#1 by Commerce, Economic Opportunities, & Consumer Services:

Revises the conditions under which the prohibited image recording occurs to provide that a perpetrator must have the victim's knowledge and consent rather than knowledge or consent to avoid prosecution; allows for prosecution of an individual when the individual knows *or has reason to believe* an image was created *in a manner* that violates the provisions of the committee substitute relating to video voyeurism dissemination and commercial video voyeurism

¹⁰ *Id.* at 421, 153. The Washington statute was distinct from the language proposed in CS/SB 284 in that the Washington statute did not expressly address so-called "upskirt" photography, while CS/SB 284 contains provisions expressly prohibiting recording under or through someone's clothing. The Washington Supreme Court held that the state's statute did not prohibit the "upskirt" photographs taken by the defendants in that case.

dissemination; exempts from the committee substitute's provisions the dissemination of images by providers of wire or oral communications, tone-only paging communications, remote computing services, tracking devices, or electronic funds transfer; and clarifies that a second violation of the legislation's provisions will be charged as a misdemeanor of the first degree.

(WITH TITLE AMENDMENT)

#1 by Criminal Justice:

Amends Amendment #1 (barcode 450960) by Commerce, Economic Opportunities, and Consumer Services to allow for prosecution of an individual who knew or had reason to believe an image was created in a manner *described* in the section, rather than in a manner that *violates* the section. This amendment puts the focus on the method of creation of the image, not on whether the disseminator had knowledge of the elements of the statute and the original voyeur's intent.

#2 by Criminal Justice:

Clarifies that an agency that seizes images created through video voyeurism is not required to destroy the image until it is no longer required for an official purpose.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
