

# 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/CS/SB 284

SPONSOR: Judiciary Committee, Communication and Public Utilities Committee and Senator Aronberg

SUBJECT: Video Voyeurism

DATE: April 6, 2004

REVISED: \_\_\_\_\_

	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>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/CS</u>
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This bill creates the crimes of, and penalties for, video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination. The bill provides definitions and also creates exemptions from these provisions, including a limited exception for merchants in certain circumstances. 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, when they are no longer needed for an official purpose. The bill also reenacts multiple statute subsections with cross-references to ensure the cross-references are up-to-date if the bill becomes law.

The bill creates section 810.145, Florida Statutes, and substantially amends s 932.701 and s. 932.7055 of the Florida Statutes.

## 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.<sup>1</sup>

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 passed “Stephanie’s Law,” which criminalizes video voyeurism behavior based on an incident where a landlord observed one of his tenants over several months through a tiny camera in a smoke detector. 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.<sup>2</sup>

### ***Florida Law on Voyeurism***

Section 810.14, F.S., establishes the crime of voyeurism, which 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.”<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

### ***Florida Contraband Forfeiture Act***

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, and personal property such as a vessel or aircraft, or real property.<sup>7</sup>

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<sup>1</sup> 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).

<sup>2</sup> Stephanie’s Law, ch. 69, Laws of New York, 2003.

<sup>3</sup> Section 810.14(1), F.S.

<sup>4</sup> *Id* at (2).

<sup>5</sup> *Id* at (3).

<sup>6</sup> *Id* at (4).

<sup>7</sup> Section 932.701(2)(a)1., 2., 5., & 6., F.S.

The Act authorizes seizure and forfeiture for contraband articles that are used in violation of the Florida Contraband Forfeiture Act. Immediately upon seizure, all rights to, interest in, and title to contraband articles vest in the seizing law enforcement agency.<sup>8</sup> Personal property may be seized at the time of the violation, or later, if the person is provided proper notice that there is a right to an adversarial preliminary hearing to determine probable cause that the property has been used in contravention of the Act. Should the court determine probable cause, a seizure, or continued seizure is ordered.<sup>9</sup>

In a separate forfeiture proceeding, the seizing agency must establish by a preponderance of the evidence that the owner either knew, or should have known after a reasonable inquiry, that the property was employed or likely to be employed in criminal activity. In the case of joint ownership, prior to forfeiture, a seizing agency is required to show by a preponderance of the evidence that the co-owner knew, or should have known, after reasonable inquiry, that the property was employed or likely to be employed in criminal activity.<sup>10</sup>

An owner whose property is subject to forfeiture has the right to a jury trial.<sup>11</sup> The burden of proof in a forfeiture case is clear and convincing evidence. Where the claimant prevails, the property is returned immediately, and reasonable attorney's fees and costs are awarded.<sup>12</sup>

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 the property, sell the property, or salvage, trade, or transfer the property to a public or nonprofit organization.<sup>13</sup>

## II. Effect of Proposed Changes:

This bill creates the crimes of, and penalties for, video voyeurism, video voyeurism dissemination, and commercial video voyeurism dissemination.

This bill 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 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,

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<sup>8</sup> Section 932.703(1), F.S.

<sup>9</sup> Section 932.703(2), F.S.

<sup>10</sup> Section 932.703(5) and (7), F.S.

<sup>11</sup> Section 932.704(3), F.S.

<sup>12</sup> Section 932.704(9) and (10), F.S.

<sup>13</sup> Section 932.7055(1)(a)-(c), F.S.

- 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 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
- 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 bill 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 bill 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, such as providers of wire or oral communications, tone-only paging communications, remote computing services, tracking devices, or electronic funds transfer. A limited exception is also provided for a merchant observing customers in dressing, fitting or changing rooms or restrooms, where the observation is within the scope of the merchant's duties and does not otherwise violate certain laws, or if the customer invites or consents to the merchant's presence.

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 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.

In the Florida Contraband Forfeiture Act, the definition of "contraband article" is amended to include any personal property, such as, 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. The bill requires an agency that has received, through forfeiture, illegal video voyeurism images to destroy any image and the medium upon which the image is recorded when it is no longer needed for an official purpose, including, but not limited to, a photograph, video tape, diskette, compact disk, or fixed disk. The agency may not sell or retain any image.

### ***Technical Changes***

A cross-reference is conformed to a section renumbering change made by the bill. This bill 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 bill. 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 bill. 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 bill if the bill becomes law.

This bill also reenacts s. 932.703(4), F.S., for the purpose of incorporating the amendment to s. 932.701, F.S., made in this bill. 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 bill.

The bill takes effect July 1, 2004.

### III. 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 the bill was challenged on the grounds that it was unconstitutionally overbroad.<sup>14</sup> 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 interpret the plain language of the statute without drawing in constitutionally protected free speech.<sup>15</sup>

### IV. 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.

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<sup>14</sup> *State of Washington v. Glas*, 147 Wash. 2d 410, 54 P.3d 147 (Wash. 2002).

<sup>15</sup> *Id* at 142, 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 defendants in that case.

**V. Technical Deficiencies:**

Two issues warrant mention:

- The bill 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 bill to revise those provisions. Additionally, for sentencing purposes, it is unclear what penalty should be applied to someone who violates the bill's provisions for a second time. The Legislature may wish to amend the bill to provide clarification.
- Other than the new charges of video voyeurism dissemination, or commercial video voyeurism dissemination, it appears that the same elements of the crime of video voyeurism are present in both this bill and in current law (s. 810.14, F.S.) Charging a defendant under both provisions may bring a constitutional challenge based on double jeopardy. The Supreme Court in *United States v. Dixon* set out the application of the Blockburger, or the same elements test. The same elements test provides that the prohibition against double jeopardy does not apply where there are two distinct offenses and each offense requires proof of fact that the other does not.<sup>16</sup> Likewise, charging twice for the same crime, as demonstrated by the prosecution proving the same elements for both crimes may be unconstitutional.<sup>17</sup> Therefore, to the extent that this bill does not amend the existing law on video voyeurism, but creates a new section prohibiting it, there may be confusion about which provision to charge a defendant under, and the prosecution may be prohibited from charging under both, as limited by Blockburger.

**VI. 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.

**VII. Amendments:**

None.

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

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<sup>16</sup> 509 U.S. 688, 703 (1993).

<sup>17</sup> See, generally, *Blockburger v. United States*, 284 U.S. 299 (1932).