

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Criminal and Civil Justice Appropriations Committee

BILL: CS/SB 328

INTRODUCER: Criminal and Civil Justice Appropriations and Senator Aronberg

SUBJECT: Video Voyeurism

DATE: April 10, 2008

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Clodfelter	Cannon	CJ	Favorable
2. Daniell	Maclure	JU	Favorable
3. Butler	Sadberry	JA	Fav/CS
4. _____	_____	_____	_____
5. _____	_____	_____	_____
6. _____	_____	_____	_____

I. Summary:

Currently, s. 810.145, F.S. provides that a person who commits the offense of video voyeurism commits a first degree misdemeanor. If a person commits the offense of video voyeurism and has a prior conviction for video voyeurism, the person commits a third degree felony.

This bill creates additional video voyeurism offenses that are third-degree felonies:

- If the offender is 18 years of age or older and commits video voyeurism against a child under 16 when the offender is responsible for the welfare of the child, regardless of whether the person knows or has reason to know the age of the child;
- If the offender is 18 years of age or older and is employed at a voluntary prekindergarten program or K-12 school, whether public or private, and commits video voyeurism against a student;
- If the offender is 24 years of age or older and commits video voyeurism against a child younger than 16 years of age, regardless of whether the person knows or has reason to know the age of the child.

The bill provides that the penalties for these offenses increase to a second degree felony if the offender has a prior conviction for video voyeurism.

The Criminal Justice Impact Conference, which provides the official estimate of the prison bed impact of legislation, estimated that this bill will have an insignificant impact on prison beds.

This bill substantially amends section 810.145, 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 due to the rapidly increasing use of technology.

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. Thus, surveillance cameras photograph a person who lives and works in a metropolitan area in the United States an average of twenty times per day. ...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. For example, with the increased number of cell phones being equipped with digital cameras, "Peeping Toms" no longer need to hide in dressing rooms. A 2004 study estimated that there would be 2 billion wireless subscribers in the world by 2008.² A mobile devices analyst estimated that 100 million camera phones would be shipped to the United States in 2008.³ Another study predicted that 87 percent of all cell phones sold in 2009 would have the ability to take pictures.⁴

In 2004, the federal government passed the Video Voyeurism Prevention Act of 2004⁵ in order to "protect the privacy of individuals from the surreptitious use of hidden surveillance equipment that captures an individual's image."⁶ The federal act pronounced that there are still

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 Proper Balance?*, 33 STETSON L. REV. 299, 305-06 (2003).

² Susan W. Brenner, *Law in an Era of Pervasive Technology*, 15 WIDENER L.J. 667, 716 fn. 299 (2006) (citing Daniel Gross, *How Many Mobile Phones Does the World Need?*, SLATE, June 2, 2004, <http://www.slate.com/id/2101625> (last visited March 10, 2008)).

³ Mark S. Sullivan, *Law May Curb Cell Phone Camera Use*, PCWORLD, available at <http://www.pcworld.com/article/id,117035-page,1/article.html> (July 23, 2004) (last visited March 3, 2008).

⁴ Timothy J. Horstmann, *Protecting Traditional Privacy Rights in A Brave New Digital World: The Threat Posted by Cellular Phone-Cameras and What States Should Do to Stop it*, 111 PENN. ST. L. REV. 739, 745 (2007).

⁵ 18 U.S.C. s. 1801.

⁶ Kristin M. Beasley, *Up-Skirt and Other Dirt: Why Cell Phone Cameras and Other Technologies Require a New Approach to Protecting Personal Privacy in Public Places*, 31 S. ILL. U. L.J. 69, 88 (2006) (quoting H.R. Rep. No. 08-504, at 5, as reprinted in 2004 U.S.C.C.A.N. 3292, 3294-95).

circumstances in which an individual retains the right to privacy in a public place.⁷ Currently, 23 states have laws addressing video voyeurism.⁸

Florida's Video Voyeurism Statute

In 2004, the Legislature created s. 810.145, F.S., to distinguish video voyeurism from the existing crime of voyeurism.⁹ An offender commits the offense of video voyeurism by:

- Intentionally using or installing an imaging device to secretly view, broadcast, or record a person 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 offender's own amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person.
- Intentionally permitting the use or installation of an imaging device to secretly view, broadcast, or record a person as stated above, but for the amusement, entertainment, sexual arousal, gratification, or profit of another person.
- Intentionally using an imaging device to secretly view, broadcast, or record under or through another person's clothing in order to view that person's body or undergarments, for the amusement, entertainment, sexual arousal, gratification, or profit of either the offender or another person.¹⁰

Section 810.145, F.S., also includes offenses of "video voyeurism dissemination"¹¹ and "commercial video voyeurism dissemination"¹² for distributing a video or image with knowledge or reason to believe that it was created as a result of video voyeurism.

The statute includes exceptions to ensure that it does not criminalize legitimate law enforcement surveillance, or security surveillance devices if a notice is posted or if the device is clearly and immediately obvious. There is also an exception for Internet service providers who do not exercise control over user content.¹³

A first-time violation of any of the provisions of s. 810.145, F.S., is a first-degree misdemeanor, punishable by a term of imprisonment not exceeding one year and a fine of not more than

⁷ *Id.* at 89.

⁸ Horstmann, *supra* note 4, at 739.

⁹ Section 810.14, F.S., establishes the crime of voyeurism. This section provides that the offense of voyeurism is committed when a person, having lewd, lascivious, or indecent intent, secretly observes another person when he or she is in a dwelling, structure, or conveyance that provides a reasonable expectation of privacy. The offense is a first-degree misdemeanor. If a person violates the section and has two or more prior convictions for the offense, the offense is a third-degree felony.

¹⁰ Section 810.145(2), F.S.

¹¹ A person commits the offense of video voyeurism dissemination if that person knows or has reason to know that an image was created as a result of video voyeurism and intentionally disseminates, distributes, or transfers the image to another person for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person. Section 810.145(3), F.S.

¹² A person commits the offense of commercial video voyeurism dissemination if that person (a) knows or has reason to know that an image was created as a result of video voyeurism and sells the image for consideration to another person; or (b) creates the image using video voyeurism and disseminates, distributes, or transfers the image to another person for that person to sell the image to others. Section 810.145(4), F.S.

¹³ Section 810.145(5), F.S.

\$1,000.¹⁴ If an offender has previously been convicted of or adjudicated delinquent for any violation of the section, the penalty is enhanced to a third-degree felony.¹⁵ A third-degree felony is punishable by imprisonment for up to five years and a fine of not more than \$5,000.¹⁶

III. Effect of Proposed Changes:

This bill creates additional video voyeurism offenses that are third-degree felonies. Conviction of these offenses requires additional elements of proof beyond that required to prove any other form of video voyeurism. These new offenses recognize the additional societal expectation that is placed upon a person who is entrusted to care for, coach, or otherwise mentor a young person.

The offense described in proposed s. 810.145(8)(a)1., F.S., requires that the offender must have been 18 years of age or older, the victim must have been under the age of 16, and the offender must have been responsible for the welfare of the victim.

While not defined in the bill, courts have held that there is nothing unconstitutionally vague or ambiguous about the phrase “other person responsible for a child’s welfare.”¹⁷ Based on other sections of the Florida Statutes and case law, it appears that persons who are responsible for a child’s welfare would include coaches, teachers, scout leaders, parents, guardians, babysitters, and those with similar relationships to the child.¹⁸

The additional offense may be proven regardless of whether the person knew or had reason to know the age of the child. This language makes the offense provided for in the bill a strict liability crime, similar to that of sex offenses, such as rape.¹⁹ Courts have held that “[s]tatutes which impose strict criminal liability, although not favored, are nonetheless constitutional.”²⁰ Of course, the nature of the relationship that makes the offender responsible for the child’s welfare also makes it likely that he or she is aware of the child’s age. It should be noted that video voyeurism is illegal regardless of the victim’s age, so there can be no “reasonable-mistake”²¹ as is sometimes alleged by persons who engage in consensual sexual activity that is illegal only because of the victim’s age.

¹⁴ See ss. 775.082(4) and 775.083(1), F.S.

¹⁵ Section 810.145(7), F.S.

¹⁶ See ss. 775.082(3) and 775.083(1), F.S.

¹⁷ *State v. Christie*, 939 So. 2d 1078, 1079 (Fla. 3d DCA 2005).

¹⁸ See ss. 39.01(46) and 827.01, F.S.; *P.N. v. Dep’t of Health & Rehabilitative Servs.*, 562 So. 2d 810, 811 (Fla. 2d DCA 1990). Additionally, other states appear to construe such a relationship to include people with supervisory authority over a minor, a teacher, administrator, coach, or other person in authority employed in a school, those employed in institutions of higher learning, caregivers, coaches outside of a school setting, instructors, leaders of scouting troops, or any person with temporary or occasional disciplinary control over the minor. See Ohio Rev. Code Ann. s. 2907.08 (2008).

¹⁹ Statutory rape is a strict liability crime because the statute does not impose proof of any *mens rea* element regarding the defendant’s knowledge of the victim’s age. *Francis v. Gov’t of the Virgin Islands*, 236 F.Supp.2d 498, 501 (D.Virgin Islands 2002); *Feliciano v. State of Florida*, 937 So. 2d 818, 820 (Fla. 1st DCA 2006) (noting that Florida has recognized statutory rape as a strict liability crime since 1891).

²⁰ *Feliciano*, 937 So. 2d at 820 (quoting *State v. Hubbard*, 751 So. 2d 552, 556 (Fla. 1999)).

²¹ See Colin Campbell, *Mistake or Lack of Information as to Victim’s Age as Defense to Statutory Rape*, 46 A.L.R. 5th 499 (originally published in 1997).

The offense described in proposed s. 810.145(8)(a)2., F.S., requires additional proof that the offender is 18 years old or older and is employed at a public or private school or voluntary prekindergarten education program where the victim is a student. These are K-12 schools as respectively defined in s. 1003.01, F.S., and s. 1002.01, F.S. The age of the victim is irrelevant as long as he or she is a student at the school. The inclusion of students over the age of 15 recognizes that older children may remain more vulnerable to abuse because of the additional trust and bond that may be established in a school setting.

The offense described in proposed s. 810.145(8)(a)3., F.S., is a third degree felony if the offender is twenty-four years of age or older and commits video voyeurism against a child younger than 16 years of age, regardless of whether the person knows or has reason to know the age of the child.

As previously noted, the new offenses are third-degree felonies, which are punishable by imprisonment for up to five years and a fine of not more than \$5,000.²² If the offender has previously been convicted of or adjudicated delinquent for any form of video voyeurism, these offenses are second-degree felonies punishable by imprisonment for up to 15 years and a fine of not more than \$10,000.²³

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

²² See ss. 775.082(3) and 775.083(1), F.S.

²³ *Id.*

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the official estimate of the prison bed impact of legislation, estimated that this bill will have an insignificant impact on prison beds.²⁴

VI. Technical Deficiencies:

On line 2 of the bill, the Legislature may want to insert the word “video” before the word “voyeurism,” in order to clarify that this bill references s. 810.145, F.S., and not s. 810.14, F.S.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal and Civil Justice Appropriations on April 10, 2008:

Provides that it is a third degree felony if the offender is twenty-four years of age or older and commits the offense of video voyeurism, as described in ch.810.145, F.S., against a child younger than 16 years of age, regardless of whether the offender knows or has a reason to know the age of the child.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

²⁴ See <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (follow “2008 Conference Results” link) (last visited March 3, 2008).