

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 437 Protection of Minors

SPONSOR(S): Criminal Justice Subcommittee; Eisnaugle and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 964

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Cunningham	Cunningham
2) Justice Appropriations Subcommittee	15 Y, 0 N	McAuliffe	Jones Darity
3) Judiciary Committee	15 Y, 1 N	Cunningham	Havlicak

SUMMARY ANALYSIS

Section 810.145, F.S., establishes the crime of video voyeurism. Section 810.145(8)(a), F.S., provides it is a 3rd degree felony for specified persons to commit video voyeurism if the victim is a student or a child less than 16. A violation of s. 810.145(8)(a), F.S., is a 2nd degree felony, ranked in Level 4 of the Offense Severity Ranking Chart, if the person has a prior video voyeurism conviction.

The bill increases the penalty for violations of s. 810.145(8)(a), F.S., from a 3rd degree felony to a 2nd degree felony. A violation of subsection (8)(a) by persons who have a prior video voyeurism conviction remains a 2nd degree felony, but the bill ranks such offense in Level 6 of the Offense Severity Ranking Chart.

The bill amends ss. 943.0435, 944.606, and 944.607, F.S., to add s. 810.145(8), F.S., to the list of offenses that qualify a person as a sexual offender. The bill also amends s. 775.21, F.S., to require a person be designated a sexual predator if the person is convicted of s. 810.145(8)(b), F.S., and has previously been convicted of a qualifying offense. This will have the effect of expanding the number of persons who qualify as sexual offenders and sexual predators.

The bill also amends s. 827.071(5), F.S., which makes it a 3rd degree felony for any person to knowingly possess, control, or intentionally view photographs, images, etc., which, in whole or in part, he or she knows to include any sexual conduct by a child. The bill specifies that if such photographs, images, etc. include sexual conduct by more than one child, then each child in each photograph, image, etc. that is knowingly possessed, controlled, or intentionally viewed is a separate offense. As a result, a person who knowingly possesses one photograph that depicts sexual conduct by four different children could be charged with four separate violations of the statute.

The Criminal Justice Impact Conference met December 14, 2011, and found the prison bed impact of this bill to be indeterminate because of the section of the bill that provides that each child in each photograph, image, etc. that is knowingly possessed, controlled, or intentionally viewed is a separate offense. The number of such offenses cannot be determined. However, this bill will likely have an insignificant impact on the state prison beds because of the low volume of offenses addressed in this bill. Additionally, the Florida Department of Law Enforcement reports that expanding the number of persons who qualify as sexual offenders and sexual predators will require programming changes to the sexual offender/sexual predator database, which will cost \$28,625 in non-recurring dollars; however, FDLE states they can absorb these costs with current resources.

The bill is effective October 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Video Voyeurism

Section 810.145, F.S., establishes the crime of 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 and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy;¹
- 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 and 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 and consent, for the purpose of viewing the body of, or the undergarments worn by, that person.²

Generally, a first-time violation of video voyeurism is a 1st degree misdemeanor,³ and second or subsequent violations are 3rd degree felonies.⁴ However, s. 810.145(8)(a), F.S., specifies that the penalty for video voyeurism is a 3rd degree felony for persons:

- Who are 18 years of age or older and who are responsible for the welfare of a child younger than 16 years of age, regardless of whether the person knows or has reason to know the age of the child, who commit video voyeurism against that child;
- Who are 18 years of age or older and who are employed at a private school,⁵ a school,⁶ or a voluntary prekindergarten education program,⁷ who commit video voyeurism against a student of the private school, school, or voluntary prekindergarten education program; or
- Who are 24 years of age or older who commit 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.⁸

Section 810.145(8)(b), F.S., makes it a 2nd degree felony⁹ if a person violates s. 810.145(8)(a), F.S., and that person has previously been convicted or adjudicated delinquent for any violation of s. 810.145,

¹ Section 810.145(1)(c), F.S., defines the phrase "place and time when a person has a reasonable expectation of privacy" as 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.

² Section 810.145(2), F.S.

³ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

⁴ 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.

⁵ As defined in s. 1002.01, F.S.

⁶ As defined in s. 1003.01, F.S.

⁷ As described in s. 1002.53(3)(a), (b), or (c), F.S.

⁸ Section 810.145(8)(a), F.S.

⁹ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

F.S. Because this offense is not currently ranked in the Criminal Punishment Code “offense severity ranking chart,”¹⁰ it defaults to a Level 4 ranking, which equates to 22 sentencing points.¹¹

The statute provides exceptions for the above-described criminal penalties to ensure that the statute does not criminalize legitimate law enforcement surveillance, security systems if a notice is posted, and video surveillance devices that are clearly and immediately obvious.¹² There is also an exception for providers of electronic communication services and providers of remote computing services.¹³

Effect of the Bill

The bill amends s. 810.145, F.S., to increase the penalties associated with the video voyeurism offenses specified in subsection (8). The penalty for first-time violations of subsection (8)(a) of the statute is increased from a 3rd degree felony to a 2nd degree felony. Violations of s. 810.145(8)(b), F.S., remain 2nd degree felonies, but the bill ranks this offense in Level 6 of the Criminal Punishment Code “offense severity ranking chart,” which equates to 36 sentencing points.

Sexual Offenders and Sexual Predators – Qualifying Offenses

In very general terms, the distinction between a sexual predator and a sexual offender is based on what offense the person has been convicted of, whether the person has previously been convicted of a sexual offense, and the date the offense was committed.

Section 943.0435, F.S., which contains various registration requirements for sexual offenders, defines the term “sexual offender,” in part, as a person who:

Has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction and has been released on or after October 1, 1997, from the sanction imposed for any conviction of such offense:

- Section 787.01, F.S. (kidnapping)
- Section 787.02, F.S. (false imprisonment)
- Section 787.025(2)(c), F.S. (luring or enticing a child where the victim is a minor and the defendant is not the victim’s parent or guardian)
- Section 794.011, F.S. (sexual battery) excluding s. 794.011(10), F.S.¹⁴
- Section 794.05, F.S. (unlawful activity with certain minors)
- Section 796.03, F.S. (procuring a person under the age of 18 for prostitution)
- Section 796.035, F.S. (selling or buying of minors into sex trafficking or prostitution)
- Section 800.04, F.S. (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age)
- Section 825.1025, F.S. (lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person)
- Section 827.071, F.S. (sexual performance by a child)
- Section 847.0133, F.S. (prohibition of certain acts in connection with obscenity)
- Section 847.0135, F.S. (computer pornography and traveling to meet a minor) excluding s. 847.0135(6), F.S.¹⁵

¹⁰ The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the “offense severity ranking chart” from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. A defendant’s sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant’s prior record; and other aggravating factors. The points are added in order to determine the “lowest permissible sentence” for the offense. Sections 921.0022 and 921.0024, F.S.

¹¹ Sections 921.0023 and 921.0024, F.S.

¹² Section 810.145(5), F.S.

¹³ *Id.*

¹⁴ Section 794.011(10), F.S., relates to falsely accusing specified persons of sexual battery.

- Section 847.0137, F.S. (transmission of pornography by electronic device or equipment)
- Section 847.0138, F.S. (transmission of material harmful to minors to a minor by electronic device or equipment)
- Section 847.0145, F.S. (selling or buying of minors)
- Section 985.701(1), F.S. (sexual misconduct with a juvenile offender)

Sections 944.606 and 944.607, F.S., which contain provisions relating to sexual offenders in the custody of or under the supervision of the Department of Corrections (DOC), also contain definitions of the term “sexual offender” that include the offenses listed above.

Section 775.21, F.S., the “Florida Sexual Predators Act,” provides, in part, that a person must be designated a “sexual predator”:

- If the person was convicted of a felony on or after October 1, 1993, that is any felony violation, or any attempt thereof, of s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim’s parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025(2)(b); s. 827.071; s. 847.0135(5); s. 847.0145; or s. 985.701(1); or a violation of a similar law of another jurisdiction; and
- The offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any violation of s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim’s parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(6); s. 847.0145; or s. 985.701(1); or a violation of a similar law of another jurisdiction.¹⁶ The offenses are often referred to as “predicate offenses.”

Effect of the Bill

The bill amends the definition of the term “sexual offender” in ss. 943.0435, 944.606, and 944.607, F.S., to add s. 810.145(8), F.S., to the list of offenses that, upon conviction, qualify a person as a sexual offender.

The bill amends s. 775.21, F.S., to require a person be designated a sexual predator if the person is convicted of s. 810.145(8)(b), F.S. (video voyeurism where the victim is a student or under the age of 16 and the defendant has a prior video voyeurism conviction), and has previously been convicted of one of the predicate offenses. The bill also includes s. 810.145(8)(b), F.S., as a predicate offense.

Sexual Performance by a Child

Section 827.071(5), F.S., provides it is a 3rd degree felony for any person to knowingly possess, control, or intentionally view a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, he or she knows to include any sexual conduct¹⁷ by a child. The statute specifies that the possession, control, or intentional viewing of each such photograph, motion picture, exhibition, show, image, data, computer depiction, representation, or presentation is a separate offense.

¹⁵ Section 847.0135(6), F.S., provides that it is unlawful for any owner or operator of a computer online service, Internet service, or local bulletin board service knowingly to permit a subscriber to use the service to commit a violation of s. 947.0135, F.S.

¹⁶ Section 775.21(4)(a), F.S.

¹⁷ The term “sexual conduct” is defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute sexual conduct. *See* section 827.071(1), F.S.

Recently, Florida's 1st District Court of Appeal reviewed a case where the defendant had been convicted of multiple counts of s. 827.071(5), F.S., based on a single video.¹⁸ The State argued that the convictions were proper because multiple children were depicted in the video.¹⁹ The court disagreed noting that s. 827.071(5), F.S., does not contemplate a separate conviction for each child depicted in a single photograph.²⁰

Effect of the Bill

The bill specifies that if a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation includes sexual conduct by more than one child, then each such child in each such photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation that is knowingly possessed, controlled, or intentionally viewed is a separate offense. As a result, a person who knowingly possesses one photograph that depicts sexual conduct by four different children could be charged with four separate violations of the statute.

B. SECTION DIRECTORY:

Section 1. Cites the bill as the "Protect Our Children Act of 2012."

Section 2. Amends s. 775.21, F.S., relating to the Florida Sexual Predators Act.

Section 3. Amends s. 827.071, F.S., relating to sexual performance by a child; penalties.

Section 4. Amends s. 943.0435, F.S., relating to sexual offenders required to register with the department; penalty.

Section 5. Amends s. 944.606, F.S., relating to sexual offenders; notification upon release.

Section 6. Amends s. 944.607, F.S., relating to notification to the Department of Law Enforcement of information on sexual offenders.

Section 7. Amends s. 810.145, F.S., relating to video voyeurism.

Section 8. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 9. Provides an October 1, 2012, effective date.

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 Criminal Justice Impact Conference met December 14, 2011, and found the prison bed impact of this bill to be indeterminate because of the section of the bill that provides that each child in each photograph, image, etc. that is knowingly possessed, controlled, or intentionally viewed is a separate offense. The number of such offenses cannot be determined. However, this bill will likely

¹⁸ *Stowe v. State*, 66 So.3d 1015 (Fla. 1st DCA 2011).

¹⁹ *Id.*

²⁰ *Id.*

have an insignificant impact on the state prison beds because of the low volume of offenses addressed in this bill.

Additionally, FDLE reports that expanding the number of persons who qualify as sexual offenders and sexual predators will require programming changes to the sexual offender/sexual predator database, which will cost \$28,625 in non-recurring dollars; however, FDLE states they can absorb these costs with current resources.

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:

The 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

On November 15, 2011, the Criminal Justice Subcommittee approved one amendment and reported the bill favorably as a committee substitute. The amendment:

- Removes language that added “residential dwellings” to the definition of “place and time when a person has a reasonable expectation of privacy” for purposes of video voyeurism.
- Amends the definition of the term “sexual offender” in ss. 944.606, and 944.607, F.S., to add s. 810.145(8), F.S., to the list of offenses that, upon conviction, qualify a person as a sexual offender.

The analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.