

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 Children, Families, and Elder Affairs Committee

BILL: CS/SB 964

INTRODUCER: Criminal Justice Committee, Senator Benacquisto and others

SUBJECT: Protection of Minors

DATE: February 8, 2012 **REVISED:** 02/08/12

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/CS
2.	Farmer	Farmer	CF	Pre-meeting
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill creates the “Protect Our Children Act” relating to laws that prohibit video voyeurism and possession of child pornography.

With respect to video voyeurism, the bill:

- Specifies that the interior of a residential dwelling is a place where a person has a reasonable expectation of privacy.
- Increases the penalty for several video voyeurism offenses and adds these offenses to the qualifying offense list that requires an offender to be designated as a sexual predator or to register as a sexual offender.

The bill also amends the child pornography statute to provide that if a prohibited item includes sexual conduct by a child, a separate offense may be charged for each child in the prohibited item.

This bill substantially amends sections 775.21, 810.145, 827.071, 921.0022, and 943.0435 of the Florida Statutes.

II. Present Situation:

Sexual Predators and Sexual Offenders

The distinction between a sexual predator and a sexual offender is based on the offense of conviction, the date the offense occurred or when sanctions were completed, and whether the person has previously been convicted of a sexual offense. Sexual predator status can only be conferred for offenses committed on or after October 1, 1993. Sexual offender status applies only if the person was released from the sanction for the designated offense on or after October 1, 1997. The list of designated offenses is not identical for sexual offenders and sexual predators, but commission of any of the following offenses would require registration as either a sexual offender or a sexual predator:

- Kidnapping, false imprisonment, or luring or enticing a child where the victim is a minor and the defendant is not the victim's parent (ss. 787.01, 787.02, and 787.025(2)(c), F.S.).
- Sexual battery under ch. 794.011, F.S. (except false accusation of another under s. 794.011(10), F.S.).
- Sexual activity by a person who is 24 years old or older with a minor who is 16 or 17 years old (s. 794.05, F.S.).
- Procuring a person under the age of 18 for prostitution (s. 796.03, F.S.).
- Selling or buying of minors into sex trafficking or prostitution (s. 796.035, F.S.).
- Lewd or lascivious offenses upon or in the presence of a person under 16 (s. 800.04, F.S.).
- Lewd or lascivious offenses upon an elderly or disabled person (s. 825.1025, F.S.).
- Enticing, promoting, or possessing images of sexual performance by a child (s. 827.071, F.S.).
- Distribution of obscene materials to a minor (s. 847.0133, F.S.).
- Computer pornography (s. 847.0135, F.S.) (except traveling to meet a minor under s. 847.0135(4), F.S.).
- Transmission of child pornography by electronic device (s. 847.0137, F.S.).
- Transmission of material harmful to minors to a minor by electronic device (s. 847.0138, F.S.).
- Selling or buying of minors for child pornography (s. 847.0145, F.S.).
- Sexual misconduct by a DJJ employee with a juvenile offender (s. 985.701(1), F.S.).
- Violating a similar law of another jurisdiction.

A sexual predator or sexual offender is required to comply with a number of statutory requirements.¹ During initial registration, a sexual predator or sexual offender who is not in the custody of the Florida Department of Corrections (DOC), the Department of Juvenile Justice (DJJ), or a local jail is required to provide certain information including the "address of legal residence and address of any temporary residence, within the state or out of the state, including a rural route address and a post office box..." to the sheriff's department within 48 hours of sentencing or of establishing a residence. The sheriff's office provides this information to the Florida Department of Law Enforcement (FDLE) for inclusion in the statewide database. The

¹ The specific offender reporting requirements and law enforcement reporting and notification requirements are found in ss. 775.21, 943.0435, 944.606, 944.607, 985.48, and 985.4815, F.S.

offender or predator must also register at a driver's license office within 48 hours of the initial registration at the sheriff's department.

Video Surveillance and Voyeurism

Video voyeurism is the unlawful use of an imaging device to surreptitiously observe another person. The practice is most often associated with a sexual motive, such as using a cell phone camera to take pictures beneath women's skirts in a shopping area or installing hidden cameras in a changing area.

In 2004, the federal government passed the Video Voyeurism Prevention Act of 2004² in order to "protect the privacy of individuals from the surreptitious use of hidden surveillance equipment that captures an individual's image."³ The Act makes it a misdemeanor for a person to intentionally capture an image of a private area of another person without his or her consent under circumstances in which the other person has a reasonable expectation of privacy. All states have criminal statutes that address video voyeurism in some form.

Florida's Video Voyeurism Statute

Florida law forbids video voyeurism if a person uses or installs an imaging device to secretly view, broadcast or record another person for "amusement, entertainment, sexual arousal, gratification, or profit," or to degrade or abuse that person. The original s. 810.145, F.S., was enacted in 1984 and created misdemeanor video voyeurism offenses. The statute was amended in 2008 to elevate certain video voyeurism offenses committed against children to felonies.

An offender commits the misdemeanor 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.⁴
- 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.⁵
- 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.⁶

² 18 U.S.C. s. 1801. The Act applies only within the special maritime and territorial jurisdiction of the United States, so does not conflict with state law.

³ 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).

⁴ Section 810.145(2)(a), F.S.

⁵ Section 810.145(2)(b), F.S.

⁶ Section 810.145(2)(c), F.S.

- Committing the offense of “video voyeurism dissemination”⁷ and “commercial video voyeurism dissemination”⁸ for distributing a video or image with knowledge or reason to believe that it was created as a result of video voyeurism.

A first-time violation of any of these provisions is a first-degree misdemeanor, punishable by a term of imprisonment not exceeding one year and a fine of not more than \$1,000. If the offender has previously been convicted of or adjudicated delinquent for any violation of the section, the penalty is enhanced to a third-degree felony, punishable by imprisonment for up to five years and a fine of not more than \$5,000.

There are three felony video voyeurism offenses in addition to those that result from enhancement of the penalty for repeat misdemeanor video voyeurism. Conviction of these offenses requires additional elements of proof:

- Section 810.145(8)(a)1., F.S., applies when the offender was 18 years of age or older, the victim was under the age of 16, and the offender was responsible for the welfare of the victim. 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.⁹
- Section 810.145(8)(a)2., F.S., applies when the offender was 18 years old or older, was employed at a public or private K-12 school or a voluntary pre-K program, and the victim was a student at the school or program.
- Section 810.145(8)(a)3., F.S., applies when the offender was 24 years of age or older and the victim was under the age of 16.

These offenses are third-degree felonies, which are punishable by imprisonment for up to five years and a fine of not more than \$5,000. 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.

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.¹⁰

During Fiscal Year 2010-2011, six persons were convicted of misdemeanor video voyeurism¹¹ and three persons were placed on community supervision as the result of being convicted of felony video voyeurism.¹²

⁷ Section 810.145(3), F.S.

⁸ Section 810.145(4), F.S.

⁹ 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).

¹⁰ Section 810.145(5), F.S.

¹¹ Information from the Florida Department of Law Enforcement provided to committee staff by the Office of Economic & Demographic Research, e-mail dated November 30, 2011.

¹² Department of Corrections Analysis of Senate Bill 436.

Possession or Intentional Viewing of Child Pornography

Section 827.071(5), F.S., prohibits a person from knowingly possessing, controlling, or intentionally viewing a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation that he or she knows to include any sexual conduct by a child in whole or in part. A separate offense may be charged for each prohibited item that is possessed. Violation of the statute is a third degree felony ranked at Level 5 of the Criminal Punishment Code, punishable by up to five years in prison.

III. Effect of Proposed Changes:

Section 1 provides that the act may be cited as the “Protect Our Children Act.”

Section 2 amends s. 775.21(4), F.S., to include violation of s. 810.145(8), F.S., as a qualifying offense for purposes of designation as a sexual predator.

Section 3 amends s. 827.071(5), F.S., to provide that a separate offense may be charged for each child included in a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation that shows sexual conduct by a child. This means, for example, that a person can be charged with two child pornography offenses if the person intentionally views a video that includes sexual conduct by two children. Previously, intentional viewing of a single video could only be charged as one offense no matter how many children are depicted in the video.

Section 4 amends s. 943.0435(1), F.S., to include violation of s. 810.145(8)(a), F.S., as an offense that requires registration as a sexual offender.

Section 5 amends two subsections in s. 810.145, F.S., the video voyeurism law:

- Section 810.145(1)(c), F.S., currently defines a “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.”

The bill amends this definition to specifically list the interior of a residential dwelling. Because the definition provides that it is not limited to the listed examples, specific inclusion of the “interior of a residential dwelling” should not change application of the law.

- Section 810.145(8)(a), F.S., includes the three video voyeurism offenses that are elevated from a first degree misdemeanor to a third degree felony because of the relative ages of the offender and victim or the position of authority that the offender holds in regard to the victim. The bill raises these offenses to second degree felonies. This increases the maximum sentence from five years to fifteen years in prison, and increases the maximum fine from

\$5,000 to \$10,000.

Section 6 amends s. 921.0022(3)(f), F.S., to rank the video voyeurism offenses raised to third degree felonies by Section 5 of the bill on the Offense Severity Ranking Chart for sentencing purposes. As unranked third degree felonies, these offenses were considered to be ranked at Level 1 and scored 4 sentencing points. As second degree felonies ranked at Level 6, they score 36 sentencing points. This greatly increases the chance that the offender will be sentenced to a term of imprisonment, particularly if he or she has prior convictions for any offense.

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.

C. Government Sector Impact:

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. 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.

VI. Technical Deficiencies:

Sections 2 and 4 of the bill amend ss.775.21(4), F.S. and s. 943.0435(1), F.S. related to designation and registration as a sexual predator to include s. 810.145(8), video voyeurism, as a qualifying crime.

There appears to be an inconsistency in sections 2 and 4 regarding the statutory reference to video voyeurism. Section 2 amends s. 775.21(4), F.S., related to the Florida Sexual Predators Act to include violation of s. 810.145(8), F.S., as a qualifying offense for purposes of designation as a sexual predator. Section 4 of the bill amends s. 943.0435, F.S., related to sexual offenders required to register with the or department to include a violation of s. 810.145(8)(a), F.S., as an offense that requires registration as a sexual offender.

Section 810.145(8), F.S. is comprised of two paragraphs: s. 810.145(8)(a) and (b). Section 810.145(8)(a), F.S., includes the three video voyeurism offenses which result in a third degree felony because of the relative ages of the offender and victim or the position of authority that the offender holds in regard to the victim. Section 810.145(b), F.S., imposes a second degree felony for certain persons who are repeat offenders with respect to committing video voyeurism against certain minors. According to FDLE, under the bill as written, the registration requirement is not consistent between s. 775.21 (which includes s. 810.145(8) in its entirety); as opposed to s. 943.0435 (which only requires registration for s. 810.145(8)(a)).¹³ The department requests that lines 101 and 134 of the bill be amended to include s. 810.145(8) in its entirety instead of only s. 810.145(a).¹⁴

The department also noted the bill did not include language adding the qualifying crime of s.810.145(8) to s. 944.606, F.S. related to notification upon release of sexual offenders and s. 944.607, F.S. related to notification to FDLE of information on sexual offenders. The department requests that the Legislature amend the bill to include the aforementioned language.¹⁵

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 Justice on January 25, 2012:

Clarifies language regarding charging a separate offense for each child who is in a picture that includes sexual activity by a 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.

¹³ Florida Department of Law Enforcement, *CS/SB 964 Fiscal Analysis* (Revised Jan. 12, 2012) (On file with the Senate Committee on Children, Families, and Elder Affairs); conversation with Mary Coffee, Florida Department of Law Enforcement ("FDLE") (Feb. 6, 2012).

¹⁴ *Id.*

¹⁵ *Id.*