STORAGE NAME: h0135z.cor ****FINAL ACTION****
DATE: June 15, 1999 ****SEE FINAL ACTION STATUS SECTION****

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CORRECTIONS
FINAL ANALYSIS

BILL #: HB 135 (**Chapter 99-154, Laws of Florida**)

RELATING TO: Controlled Substances/Child Care

SPONSOR(S): Representative Levine

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CRIME AND PUNISHMENT YEAS 5 NAYS 0
(2) CORRECTIONS YEAS 6 NAYS 0
(3) CRIMINAL JUSTICE APPROPRIATIONS
(4)
(5)

I. FINAL ACTION STATUS:

HB 135 was laid on the table on April 21, 1999. The Senate companion, SB 134, was approved by the Governor on May 13, 1999, and is now cited as **Chapter 99-154, Laws of Florida.**

II. SUMMARY:

This bill corrects a misplaced statutory provision that allows a defendant to avoid prosecution for a first degree felony where that defendant has possessed 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b) F.S. (1998 Supp.), within 1,000 feet of a child care facility if that facility did not have a conspicuous sign posted identifying the real property as a child care facility.

Moving this misplaced statutory provision, would extend this exception to a defendant who sold, manufactured, delivered or possessed with intent to sell, manufacture or deliver a controlled substance as described in s. 893.01(1)(a), (1)(b), (2)(a), or (2)(b), F.S. (1998 Supp.), within 1,000 feet of a child care facility, where no conspicuous sign identifying the child care facility was posted.

Moving the statutory provision would prevent a defendant from escaping punishment by alleging that he did not know that he was within 1,000 feet of a child care facility where the child care facilities' operators post conspicuous signs.

This act shall take effect upon becoming a law.

Moving the statutory provision is unlikely to have any fiscal impact.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Section 893.13(6)(c), F.S. states:

> Except as provided in this chapter, it is unlawful to possess in excess of 10 grams of any substance named or described in s. 893.03[1](1)(a) or (1)(b), or any combination thereof, or any mixture containing any such substance. Any person who violates this paragraph commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Following the above paragraph is the below stated language [hereinafter referred to as "misplaced statutory provision"]:

> Paragraph (c) as it relates to a child care facility does not apply unless the owner or operator of the facility posts a sign of not less than 2 square feet in size with a word legend that identifies the facility as a licensed child care facility and that is posted on the property of the child care facility in a conspicuous place where the sign is reasonably visible to the public.

Section 893.13(6)(c) F.S. (1998 Supp.) punishes as a first degree felony unlawful possession, in excess of 10 grams, of any substance, combination or mixture named or described in s. 893.01(1)(a) or (1)(b). The misplaced statutory provision, however, provides that s. 893.13(6)(c) will not apply to a licensed child care facility unless a conspicuous sign is posted.

As the misplaced statutory provision is currently placed, the behavior of a defendant possessing 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b) F.S. (1998 Supp.) and who is within 1,000 feet of a child care facility that has a conspicuous sign posted may be punished as a first degree felony.

---

[1]**Florida's Definition of Controlled Substances**

Section 893.03, F.S., contains the definition and list of controlled substances recognized by Florida Law.

Section 893.03 F.S. (1997) lists controlled substances in five schedules: Schedules I, II, III, IV, and V. A controlled substances is listed by official, common, usual, chemical, or trade name designated.
SCHEDULE I.--A substance in Schedule I has a high potential for abuse and has no currently accepted medical use in treatment in the United States and in its use under medical supervision does not meet accepted safety standards. Schedule I are listed under 893.03(1) F.S. (1997).
SCHEDULE II.--A substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence. Schedule II substances are listed under 893.03(2) F.S. (1997).
SCHEDULE III.--A substance in Schedule III has a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. Schedule III are listed under 893.03(3) F.S. (1997).
SCHEDULE IV.--A substance in Schedule IV has a low potential for abuse relative to the substances in Schedule III and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to limited physical or psychological dependence relative to the substances in Schedule III. Schedule III are listed under 893.03(4) F.S. (1997).
SCHEDULE V.--A substance, compound, mixture, or preparation of a substance in Schedule V has a low potential for abuse relative to the substances in Schedule IV and has a currently accepted medical use in treatment in the United States, and abuse of such compound, mixture, or preparation may lead to limited physical or psychological dependence relative to the substances in Schedule IV. Schedule III are listed under 893.03(5) F.S. (1997).

Bill History

On January 7, 1997, Senator Klein prefiled Senate Bill 162 titled Controlled Substances/Child Facility. This bill proposed to prohibit the sale, delivery, purchase, or possession of certain mixtures containing controlled substances; prohibit the sale, manufacture or delivery of said substances, or possession of said substances with intent to sell, manufacture, or deliver within 1,000 feet of real property comprising child care facilities. The bill further provided that the penalties do not apply unless a sign is posted that identifies the facility as a child care facility. A similar bill, HB 305, was introduced in the House of Representatives by Representative Ritter.

Bill analyses were prepared by both Senate and House staff. The Senate Criminal Justice Committee Staff Analysis [2], stated within its Effect of Proposed Changes section that SB 162 amends s. 893.13, F.S. (1996 Supp.), to make it a crime to sell manufacture, deliver or possess with the intent to sell, manufacture to deliver, controlled substances within 1,000 feet of a child care facility as defined in § 402.302(4), F.S. (1996 Supp.). The analysis noted that the penalties that would apply to this new crime are the same that attach to the "1,000 feet of a school " criminal provision.

Similarly, the Staff Analysis prepared by the House Committee on Crime and Punishment[3] essentially mirrored the Senate analysis, with respect to the effects of the proposed changes.

Both analyses contemplated making it a crime to sell, manufacture, deliver or possess with the intent to sell manufacture to deliver, controlled substances within 1,000 feet of a child care facility as defined in s. 402.302(4), F.S. (1996 Supp.) However, by placing the misplaced statutory provision subsequent to s. 893.13(6)(c), instead of subsequent to s. 893.13(1)(c)(3.), a conspicuous sign must be posted by the child care facility to prosecute an unlawful *possession* in excess of 10 grams of any substance, combination or mixture named or described in s. 893.03(1)(a) or (1)(b).

Both analyses seem to imply that the intent of the Legislature at the time was to provide an exception where a child care facility was not identified to encompass more situations than unlawful possession in excess of 10 grams of any substance, combination or mixture named or described in s. 893.03(1)(a) or (1)(b).

The bill as originally presented as SB 162 did not contain the misplaced statutory provision. The misplaced statutory provision appeared as Amendment 2, (with title amendment[4]), introduced May 1, 1997. Senator Klein moved the amendment which was adopted. The misplaced statutory provision was inserted on page 2, between lines 10 and 11.[5]

SB 162 amended s. 893.13 F.S. by adding the misplaced statutory provision following s.893.13(6)(c). Based on the Legislative history, the misplaced statutory provision should have probably followed s. 893.13(1)(c). Within the 1998 Florida Statute Supplement, Statutory Revision added a note 3 following s. 893.13(6)(c), and placed footnote 3 on the misplaced statutory provision stating that "Provisions specially relating to child care facilities are contained in paragraph (1)(c)."

Relevant Court Holdings

---

[2]Fla. S. Comm. On Crim. Just., SB 162 (1997) Staff Analysis (March 11, 1997) (on file with comm.)

[3]Fla. H.R. Comm. on Crime & Pun., HB 305(1997) Staff Analysis, p 4,(February 20, 1997) (on file with comm.)

[4]The title was amended as follows: On page 1, line 9, after the first semicolon(;) insert: providing that the penalties do not apply unless a sign is posted that identifies the facility as a child care facility. Fla. S. Jour. 1106 (May, 1, 1997).

[5]Fla. S. Jour. 1106 (May, 1, 1997).

In *Brown v. State,* James Brown was convicted for the sale of a controlled substance within 200 feet of a public housing project. 610 So.2d 1356 (Fla. 1st DCA 1993). He sought review of his conviction and sentence urging, among several grounds, the unconstitutionality of section 893.13(1)(l), F.S. (Supp.1990). *Id.* at 1357. The statute under which Mr. Brown was tried and convicted provided, in pertinent part:

> Except as authorized by this chapter, it is unlawful for any person to sell, purchase, manufacture, or deliver, or to possess with the intent to sell, purchase, manufacture, or deliver, a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, within 200 feet of the real property comprising a public or private college, university, or other postsecondary educational institution, or within 200 feet of any public park.

This statute increased the degree of the offense where the prohibited activity took place within specified locations. *Id.* Thus, appellant's sale of cocaine was increased from a second to a first degree felony by virtue of his proximity to a public housing facility pursuant to s. 893.13(1)(l)1., F.S. (Supp.1990). *Id.*

In his appeal, Mr. Brown raised two arguments which could be pertinent to HB 135. First, Mr. Brown asserted that the phrase "public housing facility" as used in the statute was unconstitutionally vague. *Id.* at 1358. Second, Mr. Brown argued that the challenged statute violated due process protections because it did not require proof that the defendant had knowledge of his proximity to the prohibited area. *Id.*

To analyze Mr. Brown's first argument the appellate court used as the standard for testing vagueness under Florida law as whether the language gave a person of ordinary intelligence fair notice of what constitutes forbidden conduct based on *Papachristou v. City of Jacksonville*[6]. *Id.* The language of the statute must "provide a definite warning of what conduct" is required or prohibited, "measured by common understanding and practice." *State v. Bussey*, 463 So.2d 1141, 1144 (Fla.1985). The court rejected Mr. Brown's first argument stating that a person of ordinary intelligence should know what was intended by the phrase "public housing facility".

For his second argument, Mr. Brown maintained that the challenged statute violated due process protections because it did not require proof that the defendant had knowledge of his proximity to the prohibited area. *Id* at 1358. He asserted that where no valid malum in se exception exists, the state must plead and prove his intent for purposes of satisfying the mens rea requirement. *Id.* The court responded that in *State v. Burch*[7], the court rejected an identical attack upon the 1000 foot drug-free zone surrounding a school. *Id.* at 1359. There the court reasoned that the statute did not require knowledge of the proximity, and that such a requirement would undercut the purpose of creating a drug-free zone. *Id.* The court then found Mr. Brown's argument in this regard unavailing and upheld the validity of the sentence enhancement statute. *Id.*

Mr. Brown appealed to the Florida Supreme Court in *Brown v. State*. 629 So.2d 841 (Fla. 1994).[8] There, the Florida Supreme Court, based its reasoning on *Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources*[9] where it found a statute unconstitutionally vague because the

---

[6]405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

[7]545 So.2d 279 (Fla. 4th DCA 1985) *approved* 558 So.2d 1(Fla.1990).

[8]The Supreme Court had mandatory jurisdiction, pursuant to Article V., section 3(b)(1) of the Florida Constitution because the Second District found the statute unconstitutionally vague in *State v. Kirkland*, 618 So.2d 230 (Fla. 2d DCA 1993) and *State v. Thomas*, 616 So.2d 1198 (Fla. 2d DCA 1993) The Court also exercised its discretionary jurisdiction based on Article V, section 3(b)(3) of the Fla. Const. because the First District Court of Appeal had found the statute constitutional in *Brown*.

[9]453 So.2d 1351, 1353 (Fla.1984)(defining a vague statute as one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement).

phrase "public housing facility" did not give adequate notice of what conduct was prohibited and, because of its imprecision, may invite arbitrary and discriminatory enforcement. *Id.* at 842.

The Court affirmed the *Papachristou v. City of Jacksonville*[10] standard for testing vagueness under Florida law as whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. *Id.* The Court further stated that the language of the statute must "provide a definite warning of what conduct is required or prohibited", "measured by common understanding and practice." *Id.* at 842 (quoting *Bussey*, 463 So.2d at 1144). "Because of its imprecision, a vague statute may invite arbitrary or discriminatory enforcement." *Id.* (quoting *Southeastern Fisheries*, 453 So.2d at 1353). "A statute is not void for vagueness if the language " 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' " *Id.((*quoting *Hitchcock v. State*, 413 So.2d 741, 747 (Fla.1982), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982)) (quoting *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947)), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982))).

The Court continued that, "when reasonably possible and consistent with constitutional rights, this Court should resolve all doubts of a statute in favor of its validity." *Id.* at 843 (quoting *State v. Wershow*, 343 So.2d 605, 607 (Fla.1977)). The Court had also held that when there is doubt about a statute in a vagueness challenge, the doubt should be resolved "in favor of the citizen and against the state." *Id*. The Court further found in the instant cases sufficient doubt about the statute, requiring the doubt to be resolved in favor of the citizen and against the State. *Id.* The Court found the statute facially invalid under the void-for-vagueness doctrine. *Id.*

The Court found that the "sticking point" of section 893.13(1)(I) F.S. (1990 Supp.) was the heart of the statute. *Id.* The Court found that the phrase "public housing facility" simply did not give citizens fair warning about what conduct was forbidden and additionally was so imprecise that it would be impossible to tell from the statute's plain language what the Legislature intended to target. *Id.* The Court in not finding a definition for the phrase in the statute stated, " While that alone is not enough to render a statute unconstitutionally vague, we have found neither definitions from case law nor related statutes to aid us in determining the meaning of 'public housing facility.'" *Id.* The Court then concluded that arbitrary or discriminatory enforcement was likely. *Id.*

The Court then compared section 893.13(1)(e), which provided enhanced penalties for drug offenses that occurred within 1000 feet of a "public or private elementary, middle, or secondary school." with s. 893.13(1)(I). *Id.* It found that the plain language of that statute gave a clearer indication of the conduct prohibited than "the amorphous phrase" "public housing facility". *Id.* The Court found that the word "school" had a common understanding, but it did not find the same about the phrase "public housing facility." *Id.*

"When a statute such as section 893.13(1)(I) does not implicate constitutionally protected conduct in an overbreadth context, a facial challenge for vagueness will be upheld only if the enactment is impermissibly vague in all of its applications". *Id.* at 843 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 495-96, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). Because section 893.13(1)(I) does not specify a standard of conduct, citizens and law enforcement must guess at what the statute prohibits. *Id.* It therefore follows that such a statute is impermissibly vague in all applications. *Id.*

The Court chose not to resort to dictionaries or to present a "parade of hypothetical horribles" in reaching their conclusion that section 893.13(1)(I) was void for vagueness. *Id.* The Court reasoned that the statute presented a due process problem because the phrase "public housing facility" gave virtually no notice to Florida citizens of the type of conduct banned in violation of Art. I, Sec. 9, of the Florida Constitution. *Id.* The Court cautioned, "No matter what goals the Legislature had in mind when enacting section 893.13(1)(I), statutes nonetheless must include sufficient guidelines to put those who will be affected on notice as to what will render them liable to criminal sanctions". When the Legislature fails to provide guidelines, this Court cannot step in and guess about legislative intent. Such a practice would constitute judicial legislating, a practice

[10]405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

neither our Constitution nor this Court allows." *Id.* (discussing Art. II, Sec. 3, Fla. Const.; *Brown v. State*, 358 So.2d 16 (Fla.1978)). The Court continued stating that precision required of statutes must come from the Legislature. *Id.* The 1997 Legislature avoided the problem raised in *Brown* by using s. 402.302, F.S. (1997) to define a child care facility.

In a later case, the court resolved whether the term "public park" was constitutionally vague. James Bryant appealed his conviction for the sale of cocaine and the sale of cocaine within 200 feet of a public park. *Bryant v. State*, 712 So.2d 781 (Fla. 2d DCA 1998). Bryant contended that phrase "public park" as used in s. 893.13(1)(d) F.S. (1995) was unconstitutionally vague because it was impossible for a person of ordinary intelligence to understand the scope or location of these areas in which the statute created enhanced sanctions. Bryant argued that the phrase did not give adequate notice of what conduct was prohibited and could cause arbitrary and discriminatory enforcement. *Id.* Bryant relied on *State v. Thomas*, 616 So.2d 1198 (Fla. 2d DCA 1993), aff'd, *Brown v. State*, 629 So.2d 841 (Fla.1994), where the court found the phase "public housing facility" unconstitutionally vague. *Id.*

The *Bryant* court found the phase “public park” constitutional. The court, followed *State v. Delgrasso*, noting that when the legislature fails to define a term within the statute, then "it should be given its plain and ordinary meaning." *Id.* at 783 (quoting 653 So.2d 459, 463 (Fla. 2d DCA 1995). In *Bryant*, the court found that the statute did not need to define the term "public park" as the term had an ordinary meaning or common understanding. *Id.* The term "public park" is more like the term "public school" in that people have a common understanding of the words "school" and "park." *Id.* The court distinguished the term "public housing facility" as not easy to define. *Id.* It additionally stated that it is not readily apparent that a facility is a public housing facility. *Id.*

In *Brown*, the Supreme Court found the term "public housing facility" to be void for vagueness where in *Bryant* the court found the term "public park" constitutional. However, the term “child care facility” may not be easy to define. The legislature in defining “child care facility” pursuant to s. 402.302 F.S. (1997) overcame the definitional hurdle raised by the courts in *Brown* and *Bryant*. Even though “child care facility” is defined, the real property containing a child care facility may not be readily apparent to a passerby just as it was not readily apparent that a “public housing facility” was a public housing facility in *Brown*. While posting a conspicuous sign is required to convict a defendant where he/she has possessed 10 grams, the statute in its present form does not provide for a conspicuous sign posting to convict in any other unlawful drug activity. In those unaddressed situations, a defendant may be successful in a constitutional challenge based on vagueness because it a court may find that it was impossible for a person of ordinary intelligence to know the location of the child care facility because it was not readily apparent that the facility was a child care facility.

B. EFFECT OF PROPOSED CHANGES:

This bill moves a misplaced statutory provision that allows a defendant to avoid prosecution for a first degree felony where that defendant has possessed 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b) F.S. (1998 Supp.), within 1,000 feet of a child care facility if that facility did not have a conspicuous sign posted identifying the real property as a child care facility to follow s. 893.13(1)(c) F.S. (1998 Supp.). Relocating the misplaced statutory provision to this location would allow a defendant to avoid exposure to prosecution for a first degree felony, when that defendant has sold, manufactured, delivered or possessed with intent to sell, manufacture or deliver a controlled substance as described in s. 893.01(1)(a), (1)(b), (2)(a), or (2)(b) (1998 F.S. Supp.), within 1,000 feet of a child care facility, where that defendant can allege that a conspicuous sign was not posted.

The misplaced statutory provision in its present location provides only one exception where a defendant may escape prosecution for a first degree felony[11]. This sole exception is where the

[1]This exception applies where the defendant has sold, manufactured, delivered or possessed with intent to sell, manufacture or deliver a controlled substance within 1,000 feet of a child care facility.

defendant possessed in excess of 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b) and there was no conspicuous sign posted identifying the property as a child care facility.

Section 893.13(1)(c)(1) F.S. (1998 Supp.) further provides that it is a first degree felony when controlled substances, named and described in s. 893.03(1)(a), (1)(b), (2)(a) or (2)(b) F.S. (1998 Supp.), are sold, manufactured, delivered, or possessed with intent to sell, manufacture or deliver. The misplaced statutory provision, in its present location, allows for the defendant to be prosecuted for sale, manufacture, delivery or possession with intent to sell, manufacture or deliver a controlled substance as described in s. 893.01(1)(a), (1)(b), (2)(a), or (2)(b) F.S.(1998 Supp.), within 1,000 feet of a child care facility without a conspicuous posting of a sign.

Section 893.13(1)(c)(1) F.S. (1998 Supp.), while imposing a mandatory three year minimum term of imprisonment where a controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a) or (2)(b) F.S. (1998 Supp.), is sold, manufactured, delivered or possessed with intent to sell, manufacture or deliver, exempts from the mandatory three year minimum term of imprisonment, where the offense was committed within 1,000 feet of the real property of a child care facility.

Moving this provision would prevent a defendant from escaping punishment by alleging that he did not know that he was within 1,000 feet of a child care facility, where the child care facilities' operators post conspicuous signs. Section 893.13 F.S. (1998 Supp), lists several physical locations, such as schools, where unlawful drug activity at such locations will receive more punishment than drug activity at non enumerated locations. With the exception of a child care facility, every other enumerated location, is generally clearly identifiable. Schools, places of worship, convenience stores, and public housing facilities are usually identifiable by signage and their unique physical appearances. A child care facility may not be, as a facility caring for as few as five children may be in a homelike or residential appearing setting.

Therefore, posting a conspicuous sign identifying a child care facility as such should satisfy a court's requirement that a facility's appearance be apparent. A conspicuous sign would render the facility's appearance apparent.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 893.13(1)(c), F.S. (1998 Supp.)

Section 893.13(6)(c), F.S. (1998 Supp.)

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Moves a misplaced provision in the statute and places it in the paragraph that actually enhances the penalty.

Section 2: Provides an effective date upon becoming law.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

4. Total Revenues and Expenditures:

See, Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See, Fiscal Comments.

2. Direct Private Sector Benefits:

See, Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See, Fiscal Comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference estimates that the bill will have no prison impact. There is no case law on whether the glitch prevented prosecutors from applying the enhanced penalty for selling or possessing with intent to sell certain drugs within 1,000 feet of a day care facility. On February 21, 1997, the Criminal Justice Estimating Conference determined that the original bill had a potentially significant impact on prison beds.

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise the revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

VI. COMMENTS:

Constitutional Concerns

The Legislature in not exposing a defendant to an increased degree of the offense unless a conspicuous sign identifying a child care facility is posted and defining a child care facility pursuant to s.402.302 F.S. (1997) appears to have adequate addressed recent constitutional concerns, that may affect s. 893.13 F.S., raised within the courts.

However, there may be an additional consititutional concern with respect to ex post facto laws. This bill is effective upon becoming a law. This bill will augment punishment for a broader range of unlawful drug activity. Whenever there is a proposed change to a criminal statute, the legislature may wish to insure that its change will not implicate the
the Florida[12] and United States[13] Constitution prohibitions on ex post facto law.

A law violates the ex post facto clause of the constitution only if it punishes as a crime an act which was not a crime when committed, makes the punishment for a crime more onerous than it was at commission, or deprives one charged with a crime of a defense available when the crime was committed. *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). It must do more than merely alter the situation of a party to that party's disadvantage. *Id*. at 50, 110 S.Ct. 2715.

In Florida, a law or its equivalent violates the prohibition against ex post facto laws if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense. *Dugger v. Williams*, 593 So.2d 180, 181 (Fla.1991).

The bill could contain language addressing questions that may arise when this act becomes law. Questions about whether it will apply to all causes of action then pending or thereafter filed; whether its application will be extended to apply to any cause of action to inwhich a final judgment has been not been rendered; or further where the jury has returned a verdict where the judgment or verdict has been or shall be reversed are all questions that could be responded to within the bill text.

---

[12] Art. I, s. 10.Fla. Const.

[13] There are two ex post facto clauses in the U.S. Constitution which prevents both the state and federal governments from passing retroactive criminal laws. Article I section 9, clause 3, provides that: "No . . . ex post facto law shall be passed"; and Article I, section 10, clause 1 provides: "No state shall pass any ex post facto law.

Other Concern

While moving the misplaced statutory provision would prevent a defendant from escaping punishment by alleging that he did not know that he was within 1,000 feet of a child care facility, there does not appear to be any requirement, within Chapter 402 F.S. (1997) or Section 65 of the Florida Administrative Code, that child care facilities' operators post conspicuous signs.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VIII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:	Staff Director:
Johana P. Hatcher	J. Willis Renuart

AS REVISED BY THE COMMITTEE ON CORRECTIONS:

Prepared by:	Staff Director:
Leslie A. Sweet	Ken Winker

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON CORRECTIONS:

Prepared by:	Staff Director:
Johana P. Hatcher	Ken Winker