

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1840

SPONSOR: Criminal Justice Committee and Senator Lee

SUBJECT: Weapons of mass destruction

DATE: March 21, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gomez</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Florida Statutes do not contain provisions specifically addressing chemical or biological weapons of mass destruction. This bill provides that a person who, without lawful authority, manufactures, possesses, sells, delivers, displays, uses, threatens to use, attempts to use, or conspires to use, or who makes readily accessible to others a weapon of mass destruction, including any biological agent, toxin, vector, or delivery system:

- ▶ commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life, and
- ▶ if death results, commits a capital felony.

These provisions codify in Florida Statutes provisions similar to those contained in federal law. The bill contains definitions for weapons of mass destruction, biological agent, toxin, vector, or delivery system consistent with federal law.

The bill provides that a person who, without lawful authority, manufactures, possess, sells, delivers, displays, uses, threatens to use, attempts to use or conspires to use, or who makes readily accessible to others a hoax weapon of mass destruction with the intent to deceive or otherwise mislead another person into believing that the hoax weapon of mass destruction will cause terror, bodily harm, or property damage, commits a felony of the second degree. Federal law does not have a similar provision.

This act shall take effect on July 1, 2000.

This bill substantially amends and creates the following sections of the Florida Statutes: 790.166, 921.0022.

II. Present Situation:

Florida Statutes do not contain provisions specifically addressing chemical or biological weapons of mass destruction. While s. 790.001(3)(a), F.S., defines chemical weapon broadly as “any weapon of such nature, except a device known as a ‘self defense chemical spray,’” chemical weapons are treated no differently than other weapons. *See e.g.*, s. 790.001(13), F.S., (defining “weapon” to include chemical weapon,) ss. 790.23 and 790.235. F.S., (prohibition against possession of firearms by felon, delinquents, and violent career criminals includes chemical weapons).

Instead, Florida Statutes criminalize the possession or use of a “destructive device.” *See* s. 790.161, F.S. (providing for varying penalties from a third degree felony for destructive device use without intent to harm to a capital felony for destructive device use causing the death of a person). “Destructive device” is defined in s. 790.001(4), F.S., to include the common bomb, or other devices such as a grenade or pipebomb. While this definition includes devices which contain poison gas or containers filled with explosive or expanding gas, it does not expressly address chemical or biological weapons of mass destruction.

Federal Law

The federal government does prohibit the *use* of chemical or biological weapons of mass destruction in the U.S. Code, as follows:

A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction (other than a chemical weapon as that term is defined in section 229F), including any biological agent, toxin, or vector (as those terms are defined in section 178)

(1) against a national of the United States while such national is outside of the United States;

(2) against a person within the United States, and the results of such use affect interstate or foreign commerce or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce; or

(3) against property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States,

shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

18 U.S.C., sect. 2332a.

The U.S. Code goes on to define the term “weapon of mass destruction” to include any destructive device, any weapon intended to cause serious bodily injury through toxic or poisonous chemicals, any weapon involving disease organism, or any weapon that is designed to release

radiation or radioactivity at a level dangerous to human life. *See* 18 U.S.C., sect. 2332c. The U.S. Code also provides detailed definitions for chemical weapon, biological agent, toxin, delivery systems, and vectors, crucial terms contained in the offense. *See* 18 U.S.C., sects. 178, 229f.

Planting a Hoax Bomb Prohibited

Florida law does not prohibit the possession of a “hoax weapon of mass destruction.” However, s. 790.165, F.S., prohibits the manufacture, possession or delivery of a hoax bomb. The offense is generally punished as a third degree felony, and enhanced to a second degree felony if the offender possessed, displayed or threatened to use the hoax bomb while committing another felony. s. 790.165, F.S. (2) & (3). “Hoax bomb” is defined as follows:

any device or object that by its design, construction, content, or characteristics appears to be, or to contain, or is represented to be or to contain, a destructive device or explosive as defined in this chapter, but is, in fact, an inoperative facsimile or imitation of such a destructive device or explosive, or contains no destructive device or explosive as was represented.

The definition of “hoax weapon of mass destruction,” contained in this bill is substantially similar to the above definition.

In *In the Interest of T.C.*, 573 So. 2d 121, (4th DCA 1991), the court upheld the constitutionality of the “hoax bomb” statute. The court rejected a due process argument that the criminalization of inherently innocent objects or activity interferes with the legitimate personal and property rights of individuals without evidence of criminal behavior. *Id.* at 124. However, in order to uphold the statute, the court construed it to require an element of intent and rejected the state’s argument that an offender’s intent was irrelevant on the question of whether an object is a hoax bomb. *Id.* at 123. *See* “Other Constitutional Issues,” below for further discussion.

III. Effect of Proposed Changes:

Florida Statutes do not contain provisions specifically addressing chemical or biological weapons of mass destruction. This bill creates various criminal penalties related to chemical or biological weapons of mass destruction as follows.

Weapon of Mass Destruction

The bill provides that a person who, without lawful authority, manufactures, possesses, sells, delivers, displays, uses, threatens to use, attempts to use, or conspires to use, or who makes readily accessible to others a weapon of mass destruction, including any biological agent, toxin, vector, or delivery system:

- ▶ commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life, and
- ▶ if death results, commits a capital felony.

The bill provides a definition of “weapon of mass destruction,” similar to the definition contained in the federal law. *See* 18 U.S.C. s.2232a(c). The definition includes any device or object intended to cause serious bodily injury through toxic or poisonous chemicals, any device or object involving disease organism, or any device or object that is designed to release radiation or radioactivity at a level dangerous to human life. The bill also provides definitions for “biological agent,” “toxin,” “delivery system,” and “vector” consistent with federal law. *See* 18 U.S.C., sects. 178, 229f.

These provisions will codify in Florida Statutes, provisions similar to those contained in federal law. *See* 18 U.S.C., sect. 2332a. However, these provisions unlike those in federal law, will also prohibit the manufacture, possession, sale, delivery and display of weapons of mass destruction. Federal law only addresses the use, threatened use and conspiracy to use.

Hoax Weapon of Mass Destruction

The bill provides that a person who, without lawful authority, manufactures, possess, sells, delivers, displays, uses, threatens to use, attempts to use or conspires to use, or who makes readily accessible to others a hoax weapon of mass destruction with the intent to deceive or otherwise mislead another person into believing that the hoax weapon of mass destruction will cause terror, bodily harm, or property damage, commits a felony of the second degree.

“Hoax weapon of mass destruction” is defined in a manner similar to the existing definition of “hoax bomb” found in s. 790.165, F.S. It means a device that by its design or construction appears to be or is represented to be a weapon of mass destruction, but which is actually an inoperative facsimile, imitation, counterfeit, or representation.

Offense Rankings; Potential Penalties

All felony offenders whose offenses were committed on or after October 1, 1998 are subject to the Criminal Punishment Code. The Code allows the trial judge to sentence any felony offender to the statutory maximum for the offense degree. Consequently, any person convicted of the weapons of mass destruction offense may be subject to a term of life imprisonment and any person convicted of the hoax weapon of mass destruction offense is subject to 15 years imprisonment, (the maximum sentence for a second-degree felony).

The Code provides for a minimum sentence below which the judge may not sentence an offender without providing written reasons. s. 921.00265, F.S. The minimum sentence is calculated by computing various factors like victim injury and prior record. s. 921.0024, F.S. The Offense Severity Ranking Chart ranks most felony offenses from levels 1 to 10, and is another factor which goes into the minimum sentence calculation. A level 10 offense scores highest; level 1 and level “M” score lowest. s. 921.0022, F.S.

This bill ranks the weapon of mass destruction offense, a first degree felony punishable by life imprisonment, in Level 9. Under the Code, a Level 9 offense sets the lowest permissible sentence at 48 months prison, (assuming no other offenses are committed, no prior record, and no victim injury points are scored). This bill ranks the hoax weapon of mass destruction offense, a second degree felony, in Level 7. Under the Code, a Level 7 offense sets the lowest permissible sentence

at 21 months prison, (assuming no other offenses are committed, no prior record, and no victim injury points are scored).

A person who causes the death of another through the use of a weapon of mass destruction commits a capital offense, which may subject the person to the death penalty. If the person is not sentenced to death the court must impose a sentence of life imprisonment, without eligibility for parole. s. 775.082(1), F.S.

Exceptions

The provisions of this bill do not apply to armed services personnel, governmental agencies or personnel, or private entities otherwise engaged in lawful activity within the scope of the employment.

This act shall take effect on July 1, 2000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The definition of “hoax weapon of mass destruction” is similar to the definition contained in the “hoax bomb” statute, s. 790.165, F.S. In *In the Interest of T.C.*, 573 So. 2d 121, (4th DCA 1991), the court upheld the constitutionality of the “hoax bomb” statute. The court rejected a due process argument that the criminalization of inherently innocent objects or activity interferes with the legitimate personal and property rights of individuals without evidence of criminal behavior. *Id.* at 124. The court agreed that “it would be unreasonable to punish the mere possession of radios or children’s toys because a trained officer thinks they might contain a bomb.” *Id.* at 123-4.

However, in order to uphold the statute, the court construed it to require an element of intent and rejected the state’s argument that an offender’s intent was irrelevant on the question of whether an object is a hoax bomb. *Id.* at 123. The court stated:

[The hoax bomb] must imitate a device which is intended to be a weapon.
In other words, the maker or possessor of a hoax bomb must intend the

device to be perceived as a weapon or the imitation must be used or designed to be used and perceived as a weapon. Contrary to the state's position in the trial court, the intention of the perpetrator is an essential element of the crime....

Thus, we hold that a violation of the statute requires that the perpetrator design, intend or use the imitation destructive devices in such a way as to appear to be a weapon. Under this construction, we hold the statute is constitutional.

Id. at 123-4.

The hoax weapons of mass destruction provisions contain an intent element designed to address the court's concerns in *T.C.* The bill provides that a person must use or possess a hoax weapon of mass destruction *with the intent to deceive or otherwise mislead another person into believing that the hoax weapon of mass destruction will cause terror, bodily harm, or property damage.*

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill creates new felony offenses as follows: a capital felony, first degree felony punishable by life imprisonment, and a second degree felony. Consequently, the bill could have an impact on the courts, county jails and state prison system. The Criminal Justice Estimating Conference is statutorily charged with reviewing the potential impact of newly created crimes on the state prison system. As of this writing, the Conference has not reviewed this bill's prison bed impact. Staff anticipates that the Conference will conclude that this bill's impact will be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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