

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: SB 440

SPONSOR: Senator Klein

SUBJECT: Imitation Controlled Substances/Sale

DATE: March 22, 2000

REVISED: 04/11/00 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/1 amendment</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Senate Bill 440 amends s. 817.564, F.S., relating to imitation controlled substances, to provide that civil or criminal liability may not be imposed by virtue of this section against any law enforcement officer engaged in an active criminal investigation in which the officer is selling imitation controlled substances (typically a “reverse sting operation”) as part of that investigation.

This bill substantially amends s. 817.564, F.S.

II. Present Situation:

Section 817.564, F.S., defines an “imitation controlled substance” as a pill, capsule, tablet, or substance in any form whatsoever which is not a controlled substance enumerated in ch. 893, F.S., which is subject to abuse, and which:

- By overall dosage unit appearance, including color, shape, size, markings, and packaging, or by representations made, would cause the likelihood that such a pill, capsule, tablet, or substance will be mistaken for a controlled substance unless such substance was introduced into commerce prior to initial introduction into commerce of the controlled substance which it is alleged to imitate; or
- By express or implied representations, purports to act like a controlled substance as a stimulant or depressant of the central nervous system and which is not commonly used or recognized for use in that particular formulation for any purpose other than for such stimulant or depressant effect, unless marketed, promoted, or sold as permitted by the United States Food and Drug Administration.

Section 817.564(6), F.S., provides that no civil or criminal liability shall be imposed by virtue of s. 817.564, F.S., on any person operating in accordance with the Florida Comprehensive Drug Abuse Prevention and Control Act who manufactures, dispenses, sells, gives, or distributes an

imitation controlled substance for use as a placebo by a licensed practitioner in the course of professional practice or research.

Subsection (6) does not exempt from civil or criminal liability a law enforcement officer engaged in an active criminal investigation in which the officer is selling imitation controlled substances (typically a “reverse sting operation”) as part of that investigation. No other section of Florida law provides for such an exception, including: s. 893.13(8)(h), F.S., which provides that the penalty provisions of s. 893.13, F.S., are not applicable to the delivery to, or actual or constructive possession of controlled substances by law enforcement officers for bona fide law enforcement purposes in the course of an active criminal investigation; or s. 893.09(5), F.S., which provides that no civil or criminal immunity shall be imposed by virtue of ch. 893, F.S., the controlled substances chapter, upon any person whose duty it is to enforce this chapter.

This issue was recently addressed by the Fourth District Court of Appeal in *Hamon v. Florida*, 744 So.2d 1065 (Fla. 4th DCA 1999). The court was not specifically reviewing the issue of whether the sale of counterfeit cocaine to Harmon by undercover officers engaged in a reverse sting operation was illegal under s. 817.564, F.S., but in the context of reviewing whether, under s. 817.564, F.S., Harmon’s due process rights were violated when the police sold him the counterfeit cocaine, the actual issue on appeal, the court stated that it was undisputed that s. 817.564, F.S., does not provide an exemption for the sale of imitation controlled substances by law enforcement officers acting in a criminal investigation, and, as such, the sale of the counterfeit cocaine was illegal under this section.

The court specifically stated their belief that the issue of a lack of such an exemption for imitation controlled substances should be placed on the legislative agenda because the court believed that courts all over the state would continue to face this issue and to avoid further attacks in those jurisdictions. In closing, the majority stated:

. . . . [W]e fail to find one logical reason why the legislature would not approve of the police selling counterfeit cocaine when they have already approved of them selling real cocaine. Nor can we even fathom any controversy among our legislators regarding the use of a safe counterfeit cocaine in the place of real cocaine.

Hamon (slip op., p.3)

III. Effect of Proposed Changes:

Senate Bill 440 amends s. 817.564, F.S., relating to imitation controlled substances, to provide that civil or criminal liability may not be imposed by virtue of this section against any law enforcement officer engaged in an active criminal investigation in which the officer is selling imitation controlled substances (typically a “reverse sting operation”) as part of that investigation.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Senate Bill 440 may result in a cost savings by eliminating the due process issue addressed in *Hamon, supra*, as an appealable issue.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:**#1 by Criminal Justice:**

Provides that immunity from civil or criminal liability only applies to a law enforcement officer acting in the officer's official capacity during an authorized, active criminal investigation, or to an informer or third party acting under the direction or control of such officer.