SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 2300

SPONSOR: Criminal Justice Committee and Senator Crist

SUBJECT: Controlled Substances

DATE: March 9, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.	Forgas	Johnson	JU	Favorable
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 2300 creates s. 893.101, F.S., of Chapter 893, F.S., the chapter addressing controlled substance scheduling and unlawful acts involving controlled substances. The CS provides legislative findings that, for any offense under Chapter 893, F.S., the State is not required to prove that a person knew of the illicit nature of the controlled substance, and such knowledge is not an element. (The Florida Supreme Court in *Scott v. State*, 27 Fla. L. Weekly 31 (Fla. January 3, 2002) interpreted legislative intent was to require the State to prove knowledge of the illicit nature of a controlled substance.)

Further, lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of Chapter 893, F.S. If the defendant asserts this defense, the possession of the controlled substance, whether actual or constructive, gives rise to a permissive presumption that the defendant knew of the illicit nature of the substance. Where the affirmative defense is raised, the jury must be instructed on the permissive presumption.

This CS creates s. 893.101, F.S.

II. Present Situation:

Guilty Knowledge

Section 893.13(6), F.S., provides that "it is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription…."

The Standard Jury Instruction relating to possession of a controlled substance provides, in part, the following:

> Before you can find the defendant guilty of possession of a controlled substance, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. The defendant possessed a certain substance.
> 2. The substance was a controlled substance.
> 3. The defendant had knowledge of the presence of the substance.
>
> To possess means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.
>
> Possession may be actual or constructive.
>
> Actual possession means:
> a) the thing is in the hand of or on the person, or
> b) the thing is in a container in the hand of or on the person, or
> c) the thing is so close as to be within ready reach and is under the control of the person.
>
> Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.
>
> Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Section 893.13, F.S., is entitled "Burden of Proof." In the context specifically of drug possession cases, the section only addresses the admissibility of a prescription label for a person charged with an offense that was repealed in 1980.

In *Chicone v. State*, 684 So.2d 736 (Fla. 1996), the Florida Supreme Court held that "guilty knowledge is an element of possession of a controlled substance." *Id*. at 737. In reviewing the contrary holdings of a series of prior cases, the Court recognized that the "state of the law on this issue is unclear." *Id.* at 738. The Court recognized that some of the case law suggested that "guilty knowledge" must be proved in constructive possession cases but not in actual possession cases. The state had argued that the lack of knowledge of the illicit nature of the item possessed should be raised and proven as an affirmative defense. The Court rejected this argument and held that although the existing jury instructions were adequate in requiring "knowledge of the presence of the substance," "if specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed."

In *Scott v. State*, 27 Fla. Law Weekly 31 (Fla. January 3, 2002), the Court held that the defendant's knowledge of the illicit nature of a controlled substance is an element of the offense of possession of a controlled substance. Scott had been convicted of introduction or possession of contraband in a correctional facility. Scott requested that the judge read a special jury instruction based on the holding of the Chicone case. The Court ruled that the defendant had

been entitled to a jury instruction on the "element" of knowledge of the illicit nature of the substance even though Scott had not argued at trial that he did not have knowledge of the illicit nature of the substance and that failure to give the instruction was reversible error.

In dissent, Chief Justice Wells criticized the Court's holding in *Chicone* and stated

> [I] fail to see how it follows that it is for the Legislature to define elements of crimes but, when the Legislature does not include an element, that this Court corrects this Legislature's definition by writing the element into the crime.

Chief Justice Wells further stated:

> I conclude that what the State proposed in *Chicone* and which the *Chicone* Court rejected would be a more logical and less problematic approach. Lack of knowledge should be an affirmative defense. The State carries its burden by proving the possession of the contraband. This gives rise to the *Medlin* presumption [that the defendant knew of the illicit nature of the substance], and the defendant should then proceed to prove lack of knowledge and overcome the presumption through an affirmative defense. The present majority, by now assuming that this Court can write elements of crimes, has opened the door to many complications. I believe the Legislature should close this particular one by amending the statute to say that possession of contraband gives rise to a presumption of knowledge. More importantly, I believe that this Court should not write elements into statutory crimes.

It should be noted that Chief Justice Wells' dissenting opinion does not specifically address the actual and constructive possession scenarios as he simply limits his comments to the term "possession." Presumably, the chief justice was addressing both types of possession in his conclusion that knowledge should not be an element of the crime of possession of a controlled substance. However, as the majority noted in *Chicone,* there is a distinction in presuming knowledge (i.e *mens rea* or *scienter*) from actual possession versus constructive possession as the prosecution can establish a prima facie case of knowledge by proof of actual or exclusive constructive possession. To the contrary, proof of nonexclusive constructive possession alone is insufficient to justify an implication of knowledge and the prosecution must present some corroborating evidence of knowledge to establish a prima facie case. *See Chicone*, 684 So.2d at 740, quoting *State v. Oxx*, 417 So.2d 287, 290-91 (Fla. 5th DCA 1982). Otherwise, dispensing with scienter would criminalize a broad range of apparently innocent conduct (e.g. a mail carrier's unknowing delivery of a package which contained cocaine.) *Id.*, at 743, citing *Liparota v. United States*, 471 U.S. 419, 426-27 (1985).[1]

[1] In an analogous situation, the court in *United States v. Holloway*, 744 F.2d 527, 531 (6th Cir. 1984), discussed the importance of prosecutorial discretion when dealing with potentially innocent defendants. "In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on 'conscience and circumspection in prosecuting officers,…'", quoting the Unites States Supreme Court in *United States v. Dotterweich*, 320 U.S. 277, 285 (1943).

Rebuttable Presumption vs. Permissive Inference

The words "rebuttable presumption" and "permissive inference" are often used interchangeably. *See e.g., Marcolini v. State*, 673 So. 2d 3 (Fla. 1996). The Florida Supreme Court has described the distinction between a presumption that is mandatory and a presumption that is permissive:

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. *See Francis v. Franklin*, 471 U.S. 307, 314 n.2 (1985); *County Court v. Allen*, 442 U.S. 140, 157 (1979) ("[A mandatory presumption] tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.") In contrast, a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion. *See Francis v. Franklin*, 471 U.S. at 314. A mandatory rebuttable presumption requires the jury to find the presumed element once the State has proven the predicate facts giving rise to the presumption, unless the defendant persuades the jury that such a finding is unwarranted. *See id*. at 314 n.2; *Sandstrom v. Montana*, 442 U.S. 510, 517-18 (1979). Mandatory presumptions violate the Due Process Clause if they relieve the state of the burden of persuasion on an element of an offense. *See Francis v. Franklin*, 471 U.S. at 314; *Marcolini v. State*, 673 So. 2d 3, 4 (Fla. 1996).

Brake v. State, 796 So.2d 522, 529 (Fla. 2001).

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 2300 creates s. 893.101, F.S., of Chapter 893, F.S., the chapter addressing controlled substance scheduling and unlawful acts involving controlled substances. The CS provides legislative findings that, for any offense under Chapter 893, F.S., the State is not required to prove that a person knew of the illicit nature of the controlled substance, and such knowledge is not an element. (The Florida Supreme Court in *Scott v. State*, 27 Fla. L. Weekly 31 (Fla. January 3, 2002) interpreted legislative intent was to require the State to prove knowledge of the illicit nature of a controlled substance.)

Further, lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of Chapter 893, F.S. If the defendant asserts this defense, the possession of the controlled substance, whether actual or constructive, gives rise to a permissive presumption that the defendant knew of the illicit nature of the substance. Where the affirmative defense is raised, the jury must be instructed on the permissive presumption.

The provision of the CS that declares that knowledge (i.e. *mens rea*, mental intent, or scienter) of the illicit nature of a controlled substance is not an element of the offense of possession of a controlled substance effectively reverses the Florida Supreme Court's rulings in *Chicone* and *Scott* .The Legislature does, however, have the power to dispense with the element of intent and thereby punish particular acts without regard to the malicious or wrongful mental attitude of the offender. *See Chicone*, 684 So.2d at 741, footnote 8, citing to *State v. Oxx*, 417 So.2d 287, 289

(Fla. 5th DCA 1982). Accordingly, there could be situations where the CS results in the prosecution of individuals:

- who do not know that what they actually possess is a controlled substance (the mail carrier who delivers a package containing cocaine, as noted in *Chicone*); or
- who do not know that what they constructively possess is a controlled substance (a driver of a car whose passenger has placed prescription pills of valium, which are prescribed to someone other than the driver or passenger, under a seat or in the glove box).

Of course, the CS does allow the defendant to raise lack of knowledge as an affirmative defense. In this situation, the defendant will have the burden of proof to prove that he or she did not know the substance was illicit. This burden will be compounded by the fact that the defendant will have to overcome a presumption that he or she knew the substance was illicit.

The CS takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other:

The CS takes effect upon becoming a law. However, the CS does not provide whether it applies to crimes committed before becoming law, or only those offenses committed after the CS becomes law. Generally, the *ex post facto* clauses of the U.S. Constitution (Art. I, ss. 9 and 10) and the Florida Constitution (Art. I, s.10) prohibit enactment of statutes which change the legal consequences of acts committed before the effective date of the legislation. *See Dugger v. Williams*, 593 So.2d 180 (Fla. 1991). However, the prohibition against passage of *ex post facto* laws has no application to changes relating exclusively to remedy or procedure. *See Dobbert v. State of Florida*, 432 U.S. 282 (1977).

Although the general rule is that the *ex post facto* provision of the Florida constitution does not apply to purely procedural matters, where a procedural matter has a substantive effect, an *ex post facto* violation may occur. *See Dugger, supra.* For example, a new standard jury instruction which enabled the prosecution to establish guilt without proving two elements contained in the standard instruction in effect at the time of the defendant's

crime was a violation of the *ex post facto* clause, even when the statute proscribing the conduct had not changed. *See Hooper v. State*, 703 So.2d 1141 (Fla. 4th DCA 1997). Accordingly, an attempt to apply the provisions of the CS to any offenses committed prior to the effective date of the CS could run afoul of the *ex post facto* provisions of the U.S. and Florida constitutions.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An analysis of the impact of this CS was unavailable when this analysis was completed.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.