

# 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.)

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Prepared By: Criminal Justice Committee

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BILL: SB 1238

SPONSOR: Senator Wise

SUBJECT: Drug Paraphernalia Abatement

DATE: March 29, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Gordon</u>	<u>Cooper</u>	<u>CM</u>	<u>Favorable</u>
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

Senate Bill 1238 creates a 10-member task force within the Executive Office of the Governor to recommend strategies and actions for abating access to and the use and proliferation of drug paraphernalia. The bill specifies who sits on the task force, how member appointments are to be made, selection of the chairperson, the minimum number and location of meetings, public access to meetings and records, reimbursement for per diem and travel expenses, and topics to be studied by the task force, and dates for submission of a preliminary draft and final report of findings and recommendations. The first meeting of the task force must be held by July 15, 2005. The task force is abolished on July 1, 2006.

This bill creates new and as-yet unnumbered sections of the Florida Statutes.

## II. Present Situation:

### Florida Drug Paraphernalia Laws

Florida law provides a tripartite definition of the term “drug paraphernalia.” First, s. 893.145, F.S., defines generally what the term means. Second, this section also provides a non-exclusive list of items or objects that are included within the statute’s definition of “drug paraphernalia.” Third, s. 893.146, F.S., provides a non-exclusive list of factors for determining whether an item or object is drug paraphernalia.

Section 893.145, F.S., defines “drug paraphernalia” as all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, transporting, injecting, ingesting, inhaling, or otherwise introducing into the human

body a controlled substance in violation of ch. 893, F.S. (the “Florida Comprehensive Drug Abuse Prevention and Control Act”), or s. 877.111, F.S. (proscribing the inhalation, ingestion, possession, sale, purchase, or transfer of harmful chemical substances).

Further, s. 893.145, F.S., provides the following non-exclusive list of items that fall within the statutory definition of “drug paraphernalia”:

- Kits used, intended for use, or designed for use in the planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.
- Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.
- Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.
- Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.
- Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.
- Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances.
- Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.
- Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.
- Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.
- Containers and other objects used, intended for use, or designed for use in storing, concealing, or transporting controlled substances.
- Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.
- Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, hashish oil, or nitrous oxide into the human body, such as:

- Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes, with or without screens, permanent screens, hashish heads, or punctured metal bowls.
- Water pipes.
- Carburetion tubes and devices.
- Smoking and carburetion masks.
- Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.
- Miniature cocaine spoons, and cocaine vials.
- Chamber pipes.
- Carburetor pipes.
- Electric pipes.
- Air-driven pipes.
- Chillums.
- Bongs.
- Ice pipes or chillers.
- A cartridge or canister, which means a small metal device used to contain nitrous oxide.
- A charger, sometimes referred to as a “cracker,” which means a small metal or plastic device that contains an interior pin that may be used to expel nitrous oxide from a cartridge or container.
- A charging bottle, which means a device that may be used to expel nitrous oxide from a cartridge or canister.
- A whip-it, which means a device that may be used to expel nitrous oxide.
- A tank.
- A balloon.
- A hose or tube.
- A 2-liter-type soda bottle.
- Duct tape<sup>1</sup>

Section 893.146, F.S., provides that, in determining whether an object is drug paraphernalia, a court or other authority or jury must consider, in addition to all other logically relevant factors, the following factors:

- Statements by an owner or by anyone in control of the object concerning its use.
- The proximity of the object, in time and space, to a direct violation of this act.
- The proximity of the object to controlled substances.
- The existence of any residue of controlled substances on the object.
- Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he or she knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone

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<sup>1</sup> This section further provides that drug paraphernalia is contraband and is subject to civil forfeiture.

- in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.
- Instructions, oral or written, provided with the object concerning its use.
  - Descriptive materials accompanying the object which explain or depict its use.
  - Any advertising concerning its use.
  - The manner in which the object is displayed for sale.
  - Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor of or dealer in tobacco products.
  - Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.
  - The existence and scope of legitimate uses for the object in the community.
  - Expert testimony concerning its use.

Section 893.147, F.S., proscribes the possession, use, manufacture, delivery, transportation, and advertisement of drug paraphernalia. It is a first degree misdemeanor to use or possess, with intent to use, drug paraphernalia:

- To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.; or
- To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of ch. 893, F.S.<sup>2</sup>

It is a third degree felony to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used:

- To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.; or
- To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of ch. 893, F.S.<sup>3</sup>

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<sup>2</sup> “To prove possession of drug paraphernalia, the state must show that the appellant had in his possession drug paraphernalia and that he had knowledge of its presence.” *Lawson v. State*, 666 So.2d 193, 194 (Fla. 2d DCA 1995).

If the person committing the delivery and manufacturing offense delivered the drug paraphernalia to a minor, the person commits a second degree felony. It is a first degree misdemeanor to sell or otherwise deliver hypodermic syringes, needles, or other such objects to a minor, with some lawful dispensing exceptions.

It is a third degree felony to use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia, knowing, or under circumstances in which one reasonably should know, that it will be used to transport a controlled substance in violation of ch. 893, F.S., or contraband, as defined in s. 932.701(2)(a)1., F.S.

It is a first degree misdemeanor to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

Proving requisite intent is often difficult because some items sold have multiple and legal uses<sup>4</sup> or contain features that may suggest a use other than an illegal use or support a claim that the item is not being sold for an illegal use.<sup>5</sup>

### **Federal Drug Paraphernalia Laws**

Under 21 USC Sec. 863, the term “drug paraphernalia” is defined as any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter.

This definition includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, methamphetamine, or

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<sup>3</sup> “The statute does not require that a person unequivocally know that the paraphernalia will be used for an illicit purpose; rather the state must only show that the defendant knew or reasonably should have known that the drug paraphernalia would be used for such purposes. It is important to note that the intent at issue in the statute is that of the seller/defendant, not that of the buyer.” *Baldwin v. State*, 498 So.2d 1385, 1386 (Fla. 5th DCA 1986).

<sup>4</sup> In *Subuh v. State*, 732 So.2d 40, 44 (Fla. 2d DCA 1999), the court noted that a glass pipe sold by the defendant and which police claimed was a crack pipe was “very similar to the ‘glass tube’ or ‘pipette’ commonly found in any chemistry laboratory or glass ‘straw’ formerly used in hospitals for patients to drink liquids, except this one was shorter.” The court stated that “[a]lthough we are hard pressed to think of a probable lawful use for this tube when purchased from this location, there are many lawful uses for glass tubing.” *Id.*

<sup>5</sup> For example, store owners arrested in a drug paraphernalia sting claim that they are selling glass tubes with miniature roses as “ornamental novelty items”; the police claim the tubes are “nothing but ready-made crack pipes.” Brassfield, Mike. “Stores Accused of Selling Glass Tubes for Crack Pipes.” *St. Petersburg Times*, 31 December 1998. pg. 1.B. Reporting on a 2004 U.S. Customs seizure of items in a Miami-Dade County warehouse, the South Florida Sun-Sentinel noted that the items included bongos “shaped as guns,” “disguised as lipstick tubes,” and “decorated with cartoon characters such as Cat in the Hat.” One bong, which was “disguised as a thermos, was placed inside a Simpsons lunchbox.” Marrero, Diana. “Customs Agents Raid Drug Warehouse.” *South Florida Sun-Sentinel*, 4 May 2004. pg. 3.B. Similarly, reporting on a 2005 drug paraphernalia sting of head shops in Palm Beach County, the Palm Beach Post quoted one federal official as stating that bong and other drug paraphernalia seized were “disguised as cartoon characters.” Marra, Andrew. “Alleged Drug Items Seized At 3 Shops.” *Palm Beach Post*, 17 February 2005. pg. 3.B.

amphetamines into the human body. A non-exclusive list of such items is provided that is similar but not identical to the items listed in s. 893.145, F.S.

Section 863, F.S., proscribes selling or offering for sale drug paraphernalia, using the mail or any other facility of interstate commerce to transport drug paraphernalia, or importing or exporting drug paraphernalia. A person convicted of any of these offenses is to be imprisoned for not more than three years and fined. Any drug paraphernalia involved in the violation is subject to seizure and forfeiture upon conviction for the violation.

Section 863, F.S., also contains a non-exclusive list of factors to consider in determining what constitutes drug paraphernalia. This provision is similar but not identical to s. 893.146, F.S.

Section 863, F.S., also provides two exemptions for persons authorized by local, state, or federal law to manufacture, possess, or distribute such items; and any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

### **Head Shops**

“Head shop” is a loosely descriptive term that law enforcement and others use to define a particular type of establishment that they say specializes in selling items that are used in the illegal drug trade. There has been a longstanding tension between “head shop” owners and law enforcement, prosecutors, and some communities over the sale of such items. Head shop owners argue that they only engage in legitimate business activities and that they only sell such items for legitimate uses, such as for use in smoking tobacco. They contend that possession, sale, and purchase of such items are not per se illegal. They further contend that many of the same items they sell in their shops are also sold in convenience stores and general retail stores and over the Internet.<sup>6</sup>

Law enforcement, prosecutors, and opponents of head shops, argue that, despite the claims of head shop owners that they sell such items only for legitimate uses, the owners are really engaged in selling drug paraphernalia to illicit substance users and producers. They contend that some of the items sold by head shop owners have little or no real use to the general public outside of the illicit drug trade. Further, they contend that the prevalence or number of such items within one establishment and as part of the establishment’s total inventory indicate that the true motive of head shop owners is to profit from the illicit drug trade under the pretext of engaging in a legitimate business.

### **Community Approaches to Address Concerns Regarding Head Shops**

Some communities have raised concerns that head shops adversely affect quality of life, increase accessibility to drug paraphernalia, and attract or engage in criminal activity. Communities throughout the nation have taken different approaches to address concerns about head shops, including outright prohibition; moratoriums on new licenses; special business classifications;

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<sup>6</sup> “‘With the advent of the Internet,’ [Attorney General John] Ashcroft said, ‘the illegal drug paraphernalia industry has exploded in the expansion.’” Kirkland, Michael. “Feds crack down on drug paraphernalia.” United Press International. 24 February 2003. 23 March 2005<<http://www.upi.com/view.cfm?StoryID=20030224-050113-1589r>>.

nuisance abatement; fees and compliance checks on head shops that sell tobacco paraphernalia; limitations on hours of operation, window displays, and signage; lighting or security requirements; zoning; annexation of commercial properties; development standards; separation buffers; public education campaigns; media advisories of enforcement actions; and enforcement actions relating to violations of local ordinances or state laws.

### **III. Effect of Proposed Changes:**

Senate Bill 1238 creates the Drug Paraphernalia Abatement Task Force within the Executive Office of the Governor. The purpose of the task force is to recommend strategies and actions for abating access to and the use and proliferation of drug paraphernalia, as that term is defined in s. 893.145, F.S.

The task force consists of ten members of which 6 are appointed by the Governor. Members not appointed by the Governor include the Secretary of Business and Professional Regulation or his or her designee; the Director of the Office of Drug Control within the Executive Office of the Governor; a member of the Senate, appointed by the President of the Senate; and a member of the House of Representatives, appointed by the Speaker of the House of Representatives.

Members appointed by the Governor include a representative from a corporation that is licensed to do business in this state and that sells any of the items described in s. 893.145, F.S.; a local law enforcement official or officer; a member of a faith-based community; a superintendent of a school district or a principal of a secondary school; a member of a community organization concerned about issues relating to illicit activities involving controlled substances, including access to and the use and proliferation of drug paraphernalia; and a former or recovering drug addict. These members must be representative of the geographic regions and ethnic and gender diversity of this state.

The first meeting of the task force must be held by July 15, 2005, at which time the members must select by majority vote a chairperson from among the task force members. All recommendations of the task force are by majority vote. The task force meets at the call of the chairperson and must conduct at least three public meetings in localities throughout this state which have a significant urban business district or have experienced problems with illicit controlled-substance activity resulting, in part, from access to and the use and proliferation of drug paraphernalia.

Meetings of the task force are open to the public and are subject to the requirements of ch. 119, F.S. Records of the task force are public records and subject to the requirements of ch. 119, F.S., except to the extent that public access to any of those records may be restricted pursuant to that chapter.

Members of the task force serve without compensation, but are entitled to reimbursement for per diem and travel expenses in accordance with s. 112.061, F.S. The task force is staffed by the Office of Drug Control within existing appropriations.

The task force is required to study and take testimony regarding:

- The nature and extent of the problem of access to and the use and proliferation of drug paraphernalia in this state, including the extent to which the marketing, selling, or purchasing of items that may be used as drug paraphernalia may contribute to that problem.
- Businesses that sell items that may be used as drug paraphernalia, including, but not limited to, consideration of:
  - The types, ownership, organization, and operation of those businesses.
  - The regulation of those businesses and the state and federal laws applicable to them.
  - The marketing or selling of those items by those businesses.
  - The inventory and sale of those items relative to the total inventory and total sales of those businesses.
  - Measures taken by those businesses to restrict purchases of those items by minors or otherwise restrict purchases of those items.
  - The clientele of those businesses.
  - The prevalence of civil or criminal enforcement actions taken against those businesses for violations of state or federal rules or laws which are relevant to prohibited activities involving drug paraphernalia.
  - The location of those businesses relative to the location of schools, churches or places of worship, neighborhoods, and buildings, facilities, and areas where children may regularly congregate.
  - The opinions and concerns of local residents, community and neighborhood activists and leaders, faith-based community members and leaders, school personnel and students, businesses, service providers, local law enforcement officials and officers, and local government officials regarding those businesses.
  - Local or community efforts to restrict or regulate those businesses.
- Current rules and laws and current efforts by regulatory agencies and law enforcement agencies to abate access to and the use and proliferation of drug paraphernalia in this state, including, but not limited to, consideration of whether it is necessary to amend those rules or laws or propose new rules or new legislation.
- Approaches to abate access to and the use and proliferation of drug paraphernalia, including, but not limited to:
  - Conforming the rules or laws of this state to federal rules or laws that are relevant to abating access to and the use and proliferation of drug paraphernalia.
  - Restricting the marketing, selling, or purchasing of any item that may be used as drug paraphernalia and legal concerns relevant to that restriction.
  - Adopting provisions of rules or laws of other states which are relevant to abating access to and the use and proliferation of drug paraphernalia.
- Any other subject that is relevant to abating access to and the use and proliferation of drug paraphernalia.



The task force must submit a preliminary draft report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives at least 45 days before the first day of the 2006 Regular Session of the Legislature. The final report must be filed with the Governor, the President of the Senate, and the Speaker of the House of Representatives at least 30 days before the first day of the 2006 Regular Session. In addition to the findings and recommendations included in the final report, the report must include a draft of proposed rules and proposed legislation for any recommendations requiring proposed rules and proposed legislation.

Each state agency is required to fully cooperate with the task force in the performance of its duties.

All meetings of the task force and all business of the task force for which reimbursement may be requested must be concluded before the final report is filed. The task force is abolished July 1, 2006.

The bill 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.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Members of the task force serve without compensation, but are entitled to reimbursement for per diem and travel expenses in accordance with s. 112.061, F.S. The task force is staffed by the Office of Drug Control within existing appropriations.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The St. Petersburg Times recently reported that Mr. Darryl Rouson, an attorney and activist against selling paraphernalia that may be used in the illicit drug trade, testified in support of SB 1238 before “the state’s 25-member Drug Policy Advisory Council appointed by the [G]overnor and the Legislature to consider drug policy.” Franklin, Marcus. “NAACP Chief Asks For Bill to Stop Sales of Death Utensils.” St. Petersburg Times. 19 February 2005, p.1.B.

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

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## **VIII. Summary of Amendments:**

None.

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