

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: CS/CS/SB 366

INTRODUCER: Criminal Justice Committee; Regulated Industries Committee; and Senator Wise

SUBJECT: Retail Sales of Smoking Pipes and Smoking Devices

DATE: April 8, 2010

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|-------------|------------------|
| 1. | <u>Brink</u> | <u>Imhof</u> | <u>RI</u> | Fav/CS |
| 2. | <u>Erickson</u> | <u>Cannon</u> | <u>CJ</u> | Fav/CS |
| 3. | <u>Hawkins</u> | <u>Coburn</u> | <u>WPSC</u> | Favorable |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill provides that it is a first degree misdemeanor for any person to offer for sale at retail any item listed in the bill as a smoking pipe and smoking device (such as a bong) unless such person:

- Has a retail tobacco products dealer permit under s. 569.003, F.S.;
- Derives at least 75 percent of its annual gross revenues from the retail sale of cigarettes, cigars, and other tobacco products; or
- Derives no more than 25 percent of its annual gross revenues from the retail sale of items listed as “smoking pipes and smoking devices.”

The bill creates section 569.0073, Florida Statutes.

II. Present Situation:

Drug Paraphernalia

Smoking pipes and devices are commonly found at specialty stores that sell a variety of accessories associated with the use of illegal drugs. Although anti-paraphernalia laws in the

1980s ended much of these sales, these shops still exist in Florida and other states, and the sale of such paraphernalia has expanded with the advent of the Internet.¹

Federal law defines “drug paraphernalia” 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...”²

The federal law also lists items that constitute drug paraphernalia, including items listed in the bill, and more,³ and makes it illegal for any person to sell or offer for sale drug paraphernalia.⁴ The law does not apply to any person authorized by local, state, or federal law to manufacture, possess, or distribute such items.⁵ It also does not apply to any item that 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.⁶

Under s. 893.145, F.S., the definition of “drug paraphernalia” similarly includes an element of intent, and the section provides a non-exhaustive list of items that constitute drug paraphernalia. A court, jury, or other authority, when determining in a criminal case whether an object constitutes drug paraphernalia, must consider specified facts surrounding the connection between the item and the individual arrested for possessing drug paraphernalia. A court or jury is required to consider a number of factors (in addition to other logically relevant factors) in determining whether an object is drug paraphernalia, such as proximity of the object in time and space to a controlled substance, the existence of residue of controlled substances on the object, and expert testimony concerning its use.⁷

In Florida, it is a first degree misdemeanor to use or possess drug paraphernalia to produce a controlled substance or introduce a controlled substance into the body,⁸ or to advertise objects in a publication when it is known or reasonable to know that the purpose is to promote the sale of such objects for use as drug paraphernalia.⁹

It is a third degree felony to deliver, manufacture with intent to deliver, or possess with intent to deliver drug paraphernalia when it is known or reasonable to know that it will be used to produce a controlled substance or introduce a controlled substance into the body.¹⁰ It is also a third degree felony to use, possess with the intent to use, or manufacture with the intent to use drug

¹ U.S. Drug Enforcement Administration, Drug Paraphernalia, Tools of the Illegal Drug Trade, <http://www.usdoj.gov/dea/concern/paraphernaliafact.html> (last visited January 28, 2010). An example of an online headshop is [grasscity.com](http://www.grasscity.com) (<http://www.grasscity.com> (last visited January 28, 2010)). It is based in Amsterdam, The Netherlands. Another head shop site, <http://www.rollies.com> (last visited January 28, 2010), is based in Vancouver, British Columbia, Canada.

² 21 U.S.C. § 863(d).

³ *Id.*

⁴ 21 U.S.C. § 863(a).

⁵ 21 U.S.C. § 863(f).

⁶ *Id.*

⁷ Section 893.146, F.S.

⁸ Section 893.147(1), F.S.

⁹ Section 893.147(5), F.S.

¹⁰ Section 893.147(2), F.S.

paraphernalia when it is known or reasonable to know that it will be used to transport a controlled substance or contraband as defined in s. 932.701(2)(a)1, F.S.¹¹

It is a second degree felony to deliver drug paraphernalia to a minor when it is known or reasonable to know that it will be used to produce or introduce into the body a controlled substance.¹²

Retail tobacco products dealer permit

Section 569.003, F.S., requires each person, firm, association, or corporation that seeks to deal, at retail, in tobacco products within this state, or to allow a tobacco products vending machine to be located on its premises in this state, to obtain a retail tobacco products dealer permit for each place of business or the premises where tobacco products are sold.

III. Effect of Proposed Changes:

The bill creates s. 569.0073, F.S., to provide that it is a first degree misdemeanor for any person to offer for sale at retail any item listed in the bill as a smoking pipe and smoking device (such as a bong) unless such person:

- Has a retail tobacco products dealer permit under s. 569.003, F.S. The provisions of this chapter apply to any person that offers for retail sale any of the items listed as “smoking pipes and smoking devices”;
- Derives at least 75 percent of its annual gross revenues from the retail sale of cigarettes, cigars, and other tobacco products; or
- Derives no more than 25 percent of its annual gross revenues from the retail sale of items listed as “smoking pipes and smoking devices.”

The following “smoking pipes and smoking devices” are subject to the provisions of this new section:

- Metal, wooden, acrylic, glass, stone, plastic, or ceramic smoking pipes, with or without screens, permanent screens, or punctured metal bowls.
- Water pipes.
- Carburetion tubes and devices.
- Chamber pipes.
- Carburetor pipes.
- Electric pipes.
- Air-driven pipes.
- Chillums.
- Bongs.
- Ice pipes or chillers.

The effective date of the bill is July 1, 2010.

¹¹ Section 893.147(4), F.S.

¹² Section 893.147 (3), F.S.

Other Potential Implications:

The items listed as “smoking pipes and smoking devices” are items listed in the definition of “drug paraphernalia” in s. 893.145(12)(a), (b), (g), (h), (i), (j), (k), (l), and (m), F.S. Words of common usage or slang may be used to describe apparatus used for inhaling smoke. For example, “[a] water bong, also commonly known as a water pipe, is a smoking device, generally used to smoke cannabis, tobacco, or other substances. The construction of a bong and its principle of action ... [are] similar to that of the hookah, which is also called ‘water pipe.’ Smoking a bong contrasts with smoking a pipe or cigarette in two major ways: bongs cool the smoke before it enters the user’s lungs (making it easier to smoke) and a large amount of smoke is inhaled quickly as opposed to the smaller, more frequent, inhalations of pipe and cigarette smoking.”¹³ “At the side (or back) of the bong, above the water level, there is usually a small air hole (nicknamed the ... [‘carburetor’] or ‘carb’), the user covers with a finger until they believe that a sufficient amount of smoke has accumulated. After the smoke is inhaled into the lungs, the ‘carb’ is used to introduce fresh air into the bong. The fresh air introduced through the ‘carb’ hole helps to cool the smoke further.”¹⁴

Online shops that sell smoking pipes sometimes refer to a certain pipe as a “glass pipe,” “electric pipe,” “chamber pipe,” etc., based upon particular features of the pipe, e.g., the pipe is made of glass (“glass pipe”), the pipe has a battery-powered system that helps draw up the smoke (“electric pipe”), the pipe has an air chamber behind the bowl to cool and dry the smoke (“chamber pipe”),¹⁵ or the pipe has a small air hole (“carburetor pipe”).¹⁶ The term “air-driven pipes” appears to be descriptive of pipes that allow air to move, circulate, pull, or draw the smoke.

A water bong that has a compartment for ice to cool the water may be referred to as an “ice bong.”¹⁷ “Ice pipe” is a term that has been used to refer to a pipe used to smoke “crystal” methamphetamine (also known as “ice”).¹⁸

A “chillum” has been defined as “the part of a hookah that contains the tobacco, marijuana, or other substance being smoked,” “the substance that is smoked,” and a “a hookah or other water pipe adapted for smoking marijuana.”¹⁹

The bill defines “smoking pipes and devices” by simply listing what items are included in this term. However, it is presumed that prosecutors would submit evidence to indicate that the items are primarily designed or intended for use for smoking. Otherwise, potentially innocent conduct

¹³“How to Use a Water Bong,” eHow, http://www.ehow.com/how_2303367_use-water-bong.html . A “carburetor” is also drug slang for a “crack stem attachment” (referring to “crack” cocaine). U.S. Office of National Drug Control, <http://www.whitehousedrugpolicy.gov/streetterms/ByType.asp?intTypeID=2>.

¹⁴ *Id.*

¹⁵ See e.g., blazedup.com, <http://www.blazedup.com/pipes4.htm>, and topcannabis.com, <http://www.topcannabis.com/en/smoking-pipes-1/electric-pipe-de-luxe-1503.php>.

¹⁶ See e.g., bongs-sale.com, <http://www.bongs-sale.com/cat/Glass-Pipes/>, and bolinat.com, <http://www.bolinat.com/>.

¹⁷ See e.g., ehlebongs.com, <http://www.ehlebongs.com/ice-bong.php>, and smoketown.de, <http://www.smoketown-headshop.de/30cm-12-bowl-ice-bong>.

¹⁸“Ice pipes seized from Melbourne shops,” April 22, 2007, *Sydney Morning Herald*, <http://www.smh.com.au/news/NATIONAL/Ice-pipes-seized-from-Melbourne-shops/2007/04/22/1177180457019.html>.

¹⁹ Dictionary.com, <http://dictionary.reference.com/browse/chillum>.

could be criminalized.²⁰ For example, a “water pipe,” if it is not a “smoking pipe and smoking device,” is essentially a pipe through which water flows. This type of water pipe is sold for many lawful uses, such as for use in irrigation and plumbing.

Senate professional staff is unable to determine if out-of-state and foreign sellers of these “smoking pipes and smoking devices” could be prosecuted for the new offense.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons who currently, legally sell items listed as “smoking pipes and smoking devices” in the bill, but are prohibited by the bill from selling those items, will be negatively impacted by not being able to profit from the sale of those items. Manufacturers and distributors of those items will be negatively impacted to the extent that fewer items are sold as the result of the bill.

C. Government Sector Impact:

The provisions of CS/CS/SB 366 have not been reviewed by the Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any of legislation. However, the bill only creates a first degree misdemeanor, which is not

²⁰This could potentially raise legal challenges. “A statute is overbroad when legal, constitutionally protected activities are criminalized as well as illegal, unprotected activities, or when the Legislature sets a net large enough to catch all possible offenders and leaves it to the courts to step inside and determine who is being lawfully detained and who should be set free.” *Schultz v. State*, 361 So.2d 416, 418 (Fla.1978) (citation omitted). “Generally, it violates substantive due process to criminalize purely innocent conduct.” *Siplin v. State*, 972 So.2d 982, 989, n. 8 (Fla. 5th DCA 2007) (citation omitted). See *State v. Montas*, 993 So.2d 1127 (Fla. 5th DCA 2008) (finding a statute that criminalized unauthorized wearing of military uniforms and insignia to be unconstitutionally overbroad) and *Sult v. State*, 906 So.2d 1013 (Fla.2005) (finding a statute that criminalized unauthorized use of a police badge or other indicia of authority to be unconstitutional overbroad and vague and a violation of substantive due process).

punishable by a state prison sentence. According to staff of the CJIC, there will be no prison bed impact from the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Criminal Justice on March 26, 2010:

- Provides that it is a first degree misdemeanor for any person to offer for sale at retail any item listed in the bill as a smoking pipe and smoking device (such as a bong) unless such person has a retail tobacco products dealer permit under s. 569.003, F.S.; derives at least 75 percent of its annual gross revenues from the retail sale of cigarettes, cigars, and other tobacco products; or derives no more than 25 percent of its annual gross revenues from the retail sale of items listed as “smoking pipes and smoking devices.”
- Specifies items that are “smoking pipes and devices.”
- Changes the relating clause of the bill’s title and the effective of the bill.

CS by Regulated Industries on March 3, 2010:

The CS creates s. 212.05995, F.S.

The CS differs from SB 366 as follows:

- It creates s. 212.05995(1), F.S., to define the terms “cigarette,” “tobacco products,” “retail dealer,” and “sale,” as defined in s. 210.01, F.S.
- It creates s. 212.05995(6), F.S., to specify that surtax revenue must be deposited into the Department of Corrections’ Grants and Donations Trust Fund and used for its substance abuse treatment programs;
- It creates s. 212.05995(7), F.S., to exempt from the surtax retail dealers that sell cigarettes, cigars, tobacco products, smoking pipes that are intended to be used with tobacco products, or other items that are intended to be used with tobacco which are not listed under subsection (2);
- It creates s. 212.05995(8), F.S., to require that retail dealers must have a retail tobacco products dealer permit under s. 569.003, F.S., to offer for sale items listed under subsection (2). It also makes ch. 569, F.S. applicable to any retail dealer that offers for sale items listed under subsection (2); and
- It creates s. 212.05995(9), F.S., to grant the Department of Revenue rulemaking authority to administer the section.

The CS changes the effective date to January 1, 2011.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
