

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 Committee on Appropriations

BILL: CS/SB 1140

INTRODUCER: Criminal Justice Committee and Senator Stargel

SUBJECT: Drug Paraphernalia

DATE: April 16, 2013 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|-----------------|------------|--------------------|
| 1. | <u>Erickson</u> | <u>Cannon</u> | <u>CJ</u> | <u>Fav/CS</u> |
| 2. | <u>Cantral</u> | <u>Sadberry</u> | <u>ACJ</u> | <u>Fav/CS</u> |
| 3. | <u>Cantral</u> | <u>Hansen</u> | <u>AP</u> | <u>Pre-Meeting</u> |
| 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:

CS/SB 1140 makes it unlawful for a person to knowingly and willfully sell or offer for sale at retail certain drug paraphernalia, which are 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. Wooden pipes are specifically excluded. A first violation is a first degree misdemeanor; a second or subsequent violation is a third degree felony.

The bill also repeals s. 569.0073, F.S. (providing that it is unlawful for a person to offer for sale certain smoking pipes and smoking devices unless the person has a retail tobacco products dealer permit and meets other specified criteria).

The bill has an indeterminate fiscal impact. On March 21, 2013, the Criminal Justice Impact Conference met and determined the bill has an indeterminate prison bed impact.

This bill substantially amends section 893.147, Florida Statutes.

The bill repeals section 569.0073, Florida Statutes.

II. Present Situation:

Drug Paraphernalia Laws

Smoking pipes and devices are commonly found at specialty stores that sell a variety of accessories associated with the use of illegal drugs.

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 this ch. 893, F.S., or s. 877.111, F.S. (prohibiting inhaling, etc. certain substances). Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture. The term includes, but is not limited to a list of items specified in the definition. Relevant to the bill, the list includes 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.
- Chamber pipes.
- Carburetor pipes.
- Electric pipes.
- Air-driven pipes.
- Chillums.
- Bongs.
- Ice pipes or chillers.

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.¹

It is a first degree misdemeanor² to use or possess drug paraphernalia to produce a controlled substance or introduce a controlled substance into the body,³ or to advertise objects in a

¹ Section 893.146, F.S.

² A first degree misdemeanor is punishable by up to 1 year in a county jail, a fine of up to \$1,000, or both. Sections 775.082 and 775.083, F.S.

³ Section 893.147(1), F.S.

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.⁴

It is a third degree felony⁵ 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.⁶

It is also a third degree felony to use, possess with the intent to use, or manufacture with the intent to use drug 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.⁷

It is a second degree felony⁸ 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.⁹

Other Restrictions on Smoking Pipes and Devices

Section 569.0073, F.S., 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 following “smoking pipes and smoking devices” are subject to the provisions of this statute:

- 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.

⁴ Section 893.147(5), F.S.

⁵ A third degree felony is punishable by up to 5 years in state prison, a fine of up to \$5,000, or both. Sections 775.082 and 775.083, F.S.

⁶ Section 893.147(2), F.S.

⁷ Section 893.147(4), F.S.

⁸ A second degree felony is punishable by up to 15 years in state prison, a fine of up to \$10,000, or both. Sections 775.082 and 775.083, F.S.

⁹ Section 893.147(3), F.S.

- Ice pipes or chillers.

In the case of *Kelsher Enterprises, Inc. v. John R. Powell*,¹⁰ a Leon County circuit court held that s. 569.0073, F.S., is facially constitutional. On a substantive due process challenge regarding the absence of an expressed scienter requirement, the court stated that without such a requirement, s. 569.0073, F.S., would violate substantive due process; however, the court inferred such a requirement so that the offense applies only to those persons who knowingly offer the prohibited items for retail sale without a permit or to those who have a permit but knowingly offer the items for sale without meeting the percentage requirements.

While the court found that s. 569.0073, F.S., gave no guidance on certain questions regarding its proper application, it did not find the statute to be unconstitutionally vague. The court indicated it was possible that the statute could be unconstitutionally applied but a person would be able to argue an unconstitutional application. However, since the court found an interpretation by which s. 569.0073, F.S., can be constitutionally applied, the statute is not facially unconstitutional.

III. Effect of Proposed Changes:

The bill amends s. 893.147, F.S., to make it unlawful for a person to knowingly and willfully sell or offer for sale at retail certain drug paraphernalia, which are 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. The specific items are:

- Metal, 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.
- Chamber pipes.
- Carburetor pipes.
- Electric pipes.
- Air-driven pipes.
- Chillums.
- Bongs.
- Ice pipes or chillers

Wooden pipes are specifically excluded.

A first violation is a first degree misdemeanor; a second or subsequent violation is a third degree felony.

¹⁰ Case No. 2010 CA 3043, Circuit Court of the Second Judicial Circuit (Leon County), “Final Summary Judgment for Defendant” (dated January 30, 2013) (on file with the Committee on Criminal Justice). According to Attorney General staff, the plaintiff has appealed the court’s order to the First District Court of Appeal.

The bill also repeals s. 569.0073, F.S. (providing that it is unlawful for a person to offer for sale certain smoking pipes and smoking devices unless the person has a retail tobacco products dealer permit and meets other specified criteria).

The effective date of the bill is October 1, 2013.

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:

Retailers who knowingly and willfully sell the listed drug paraphernalia could face arrest and prosecution.

The Department of Business and Professional Regulation (DBPR) analyzed HB 49, which repeals s. 569.0073, F.S.¹¹ The DBPR states that 136 licensees will no longer need to buy tobacco permits if s. 569.0073, F.S., is repealed.

The DBPR further states that it is possible the criminal prohibition of the specified objects of drug paraphernalia “indicates intent to prohibit the sale of smoking pipes and devices by ‘head shops.’ However, it is possible the bill will also minimally impact other businesses that sell the kinds of smoking pipes and devices identified, but for purposes other than as drug paraphernalia. Such businesses might include estate auctioneers, antique dealers, pawn shops, flea markets, specialty gift shops and large retail stores.”¹²

In regard to the DBPR’s comment, staff notes that the listing of an object in s. 893.145, F.S., does not of itself make the listed object “drug paraphernalia.” Some of the objects listed have multiple uses or could be construed as applying to common items for sale

¹¹ Analysis of HB 49 (dated October 1, 2013), Department of Business and Professional Regulation. The original bill repeals this statute. The committee substitute for the bill amends the statute. *See* CS/HB 49.

¹² *Id.*

rather than items used in the drug trade. For example, “water pipes” could be construed as objects referred to in the drug trade as “water pipes” or pipes that convey water for household use, irrigation, and other recognized legitimate uses. However, the law provides that certain requirements must be met before a listed item can be determined to be “drug paraphernalia.”

In order for listed items to be “drug paraphernalia,” they must be 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., or s. 877.111, F.S. Additionally, the objects listed in the bill must be 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. Further, the fact finder is required to consider a number of factors (in addition to other logically relevant factors) in determining whether an object is drug paraphernalia. Finally, the offense created by the bill involves *knowingly and willfully* selling or offering for sale at retail this drug paraphernalia.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the official estimate of the prison bed impact, if any, of legislation, estimated that the original bill would have an indeterminate prison bed impact. The committee substitute does not modify penalty provisions of the original bill.

According to the DBPR, as of July 1, 2012, there were 208 licensees that had tobacco permits solely for the purpose of complying with s. 569.0073, F.S. If this statute is repealed, 136 licensees will no longer be required to obtain a tobacco permit. The permits cost \$25 annually; therefore the state will have a revenue reduction of \$3,400 (\$25 x 136 licensees).¹³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

¹³ *Id.*

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on April 1, 2013:

Removes a section of the original bill that amended s. 569.006, F.S., to authorize the Division of Alcoholic Beverages and Tobacco to suspend or revoke the permit of a retail tobacco products dealer upon sufficient cause appearing of the violation of s. 893.147, F.S. (offense involving drug paraphernalia), by the dealer's agent or employee, and that also authorized the division to assess and accept administrative fines against the dealer for each violation.

- B. **Amendments:**

None.