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: CS/CS/SB 2414

SPONSOR: Fiscal Policy Committee, Criminal Justice Committee and Senator Brown-Waite

SUBJECT: Controlled Substances

DATE: April 13, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.	Mannelli	Hadi	FP	Favorable/CS
3.				
4.				
5.				

I. Summary:

This bill is a continuation of recent legislative efforts to address the problem of "designer drugs" and drug offense penalties in Florida. The major features of the Bill are described as follows.

The term "mixture" is defined for purposes of Chapter 893, F.S., involving, in part, the scheduling of controlled substances and punishment of offenses involving controlled substances.

Dronabinol (synthetic THC), which is currently a Schedule II controlled substance, is made a Schedule II controlled substance.

The substance 1,4 Butanediol, which is converted upon ingestion to the controlled substance gamma hydrobutyric acid (GHB), is made a Schedule III controlled substance.

Currently, hydrocodone is a Schedule II and Schedule III controlled substance. Scheduling of hydrocodone in Schedule III is eliminated.

The penalties for numerous controlled substance offenses involving methamphetamine are increased by one felony degree.

Three new drug trafficking offenses are created to address trafficking in 1,4 Butanediol, GHB, and "phenthylamines," such as MDMA ("Ecstasy") and other similar drugs which are being passed off in "rave clubs" as MDMA. Those offenses are subject to mandatory minimum terms of imprisonment of 3, 7, or 15 years, and ranked in levels 7, 8, or 9 of the Criminal Punishment Code offense severity ranking chart, depending on the weight of the trafficked substance.

The current capital trafficking offense involving amphetamine, methamphetamine and certain specified mixtures is amended to include manufacturing any of these substances.

Sentencing language relevant to the sentencing of certain drug trafficking offenses is amended to address the interpretation of one Florida district court of appeal that the current sentencing language precludes habitual offender sentencing.

Objects used for unlawfully introducing nitrous oxide into the human body are listed as "drug paraphernalia."

The Bill removes the authority conferred on the court by virtue of s. 948.034, F.S., to impose a sentence of probation in lieu of imprisonment on a drug offender with repeat violations involving specified Schedule I controlled substances.

This Bill substantially amends the following sections of the Florida Statutes: 775.087; 893.02; 893.03; 893.13; 893.135; 893.145; 921.0022; and 948.034. The Bill reenacts the following sections of the Florida Statutes: 39.01(30)(a); 316.193(5); 327.35(5); 397.451(7); 414.095(1); 440.102(11)(b); 772.12(2); 782.04(1)(a), (3) and (4); 817.563; 831.31; 856.015(1)(d); 893.0356(2)(a); 893.12(2)(b), (c) and (d); 893.1351(10); 903.133; 907.041((4)(b); 921.0024(1)(b); 921.142(2); 943.0585; and 943.059.

II. Present Situation:

A. Dronabinol

As provided in s. 893.03(2)(a)5., F.S., dronabinol (synthetic THC) is a Schedule II controlled substance. (Reference in this section is generally to 21 CFR 1308, 1312 (July 2, 1999)). Tetrahydrocannabinol or THC is believed to be the major psychoactive component of marijuana. Dronabinol has a currently accepted medical use in the United States. On May 31, 1985, the U.S. Food and Drug Administration (FDA) approved Marinol (dronabinol) for use as a treatment for nausea and vomiting associated with cancer patients undergoing chemotherapy. Marinol is a registered trademark prescription drug. The drug is formulated in sesame oil and placed in soft gelatin capsules. On December 22, 1992, Marinol was approved by the FDA for use in the treatment of anorexia associated with weight loss in AIDS patients.

Marinol was formerly a Schedule I, and then a Schedule II substance in the federal controlled substance schedules. On July, 2, 1999, the Drug Enforcement Administration (DEA) rescheduled the drug to Schedule III based on its findings that Marinol has a potential for abuse less than Schedule I and II substances, is approved by the FDA and has a currently accepted medical use in the United States, and abuse of Marinol may lead to moderate or low physical dependence or high psychological dependence. Pure tetrahydrocannabinol, which has no currently accepted medical use in the United States, remains a Schedule I substance.

B. GHB, GBL and 1,4 Butanediol

Presently, the substance gamma-hydroxybutyric acid (GHB) is listed as a Schedule II controlled substance in s. 893.03(2)(b)10., F.S., including its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within its specific chemical designation.

As provided in s. 893.03(2), F.S., a substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence.

GHB is a Schedule II substance because the substance has some limited medical use; GHB has been granted orphan drug status for research into the use of the substance for the treatment of narcolepsy. In addition to GHB, some of the other Schedule II substances include opium, morphine, hydrocodone, oxycodone, and phencyclidine, all of which are referenced in s. 893.13, F.S., which prohibits the possession, purchase, sale, delivery or manufacture of these substances and other controlled substances. Section 893.135, F.S., prohibits the sale, purchase, manufacture, delivery or importation involving a significant weight of opium, morphine, hydrocodone, oxycodone, phencyclidine, and a small group of other controlled substances. Presently, there is no offense of trafficking in GHB.

On June 15, 1999, the Food and Drug Administration (FDA) issued an advisory to all health care professionals indicating their concern about the use and misuse of consumer products, some of which are labeled as dietary supplements, and other products containing GHB, gamma butyrolactone (GBL) and 1,4 Butanediol (BOL or BD). The FDA noted that it is illegal to manufacture and distribute GHB, GBL, or BD-containing products for human consumption. The agency reported that more than 122 illnesses and three deaths have been reported to the agency as a result of using products containing these ingredients.

To warn consumers about the dangers of these products, the FDA issued flyers in which it was noted that BD, GBL, and GHB are used to make floor stripper, paint thinner, and other industrial products. The FDA stated that it had determined that dietary supplements containing these substances are really unapproved drugs because of their effect on the body, and that it is illegal to sell anything for human consumption containing these substances.

The FDA noted that in 1990 it had banned use of GHB but some companies switched ingredients to GBL, and after warnings about GBL, switched to BD. The agency stated that the three substance are very similar chemicals. GBL and BD are converted in the body to GHB with the same “dangerous effects,” noted by the agency to include breathing problems, coma, vomiting, seizures and sometimes death.

GBL and BD have the same potential as GHB to be used as “date rape drugs,” and like GHB the drugs are generally found in those settings where teenagers and young adults congregate such as at “rave clubs.” Substance abuse is not limited to GHB, GBL, or BD, but runs the gamut of illegal substances, particularly MDMA (“Ecstasy”), a Schedule I controlled substance (s. 893.036(1)(a)39., F.S.), and other substances passed off as MDMA.

Prior to Florida’s Statewide Drug Control Summit 2000, which was held on February 11, 2000, the Office of Drug Control suggested including proposals to schedule 1,4 Butanediol and create offenses for trafficking in this substance, GHB, and MDMA and other phenthylamines, as topics for discussion at the Summit Drug Enforcement Workshop. These proposals were added as topics of discussion, and were discussed and endorsed by the Workshop participants.

According to the Florida Department of Law Enforcement (FDLE) legal staff who conferred with the department's chemists, GBL is already covered in Schedule II as an ester. However, 1,4 Butanediol is not covered in Schedule II and cannot be covered as an isomer, ester, ether, salt, or salt of an isomer, ester, or ester of GHB.

C. Hydrocodone and the Hayes Decision

Hydrocodone is the only controlled substance that currently appears in two schedules as a Schedule II and Schedule III controlled substance. It is sold as a prescription analgesic (pain reliever) and antitussive (cough suppressant) under such registered trademark names as Tussionex, Vicodin, Hycodan and Lorcet. Hydrocodone is distributed in tablets or pills ("single dosage units"). Typically, the pills contain acetaminophen and the tablet coating, with hydrocodone as the constituent controlled substance.

The Schedule III reference of hydrocodone covers, unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances. It is not stated if the specific exception to the Schedule III reference requires that a section excepting the Schedule III reference state that the Schedule III reference is excepted, or if the inclusion of the Schedule II reference alone indicates the specific exception of the Schedule III reference.

Section 893.135, F.S., provides, in part, that as a threshold for trafficking in hydrocodone that the knowing sale, purchase, manufacture, or importation of 4 grams or more, but less than 14 grams, of hydrocodone, or 4 grams or more of any mixture containing hydrocodone, is trafficking in illegal drugs, a first degree felony ranked in level 7 of the Code ranking chart, and punishable by a mandatory minimum term of 3 years. The specific statutory reference in the trafficking provision is to the Schedule II reference. The Schedule III reference does not appear in the trafficking provision. There is no special meaning assigned to "mixture" so the commonly understood or defined meaning of the term should apply.

In *Hayes v. State*, Case No. 94,688 (Fla.; October 1, 1999) (slip op.), the Florida Supreme Court reviewed the issue of whether Hayes, who was charged with trafficking in hydrocodone, could be charged with this trafficking offense on the possession, without prescription, of 40 Lorcet tablets, each of which contained less than 15 milligrams of hydrocodone. Critical to the charging of this offense and the narrow issue for review was whether the State could charge with trafficking based upon the aggregate weight of the 40 tablets. The court held that Hayes could not be charged with trafficking because each tablet did not contain more than 15 milligrams of hydrocodone.

The reasoning employed by the Court accords more weight to the scheduling statute, particularly the Schedule II reference, than to the inclusion of mixtures in the trafficking provision without any special definition mixtures, as well as the fact that only the Schedule II reference to hydrocodone is referenced in the trafficking provision.

The Schedule II/Schedule III referencing of hydrocodone occurred before the "trafficking in illegal drugs" provision included hydrocodone. The specific Schedule II reference in the

trafficking provision was already in that provision when hydrocodone was added. Because "[t]he legislature is presumed to know existing law when enacting statutes," *Stanfill v. State*, 360 So.2d 128, 131 (Fla. 1st DCA 1978), it can be presumed that the Legislature knew about the Schedule II/Schedule III referencing when it added hydrocodone to the trafficking provision.

"The legislature is [also] deemed to be aware of judicial interpretations of its enactments. *Newman v. State*, 1999 WL 462091*2 (Fla. 2d DCA 1999). The Legislature was presumably aware of the case law regarding mixtures in the context of offenses involving controlled substances other than hydrocodone, such as mixtures containing cocaine. *See, e.g., State v. Yu*, 400 So.2d 762 (Fla.1981) and *Velunza v. State*, 504 So.2d 780 (Fla. 3rd DCA 1987). Although not specifically addressing the definition of "mixture," it appears that the courts have not assigned any special meaning to mixture, but rather have understood it according to its generally understood meaning. On-line Medical Dictionary defines a "mixture" as "a material of variable composition that contains two or more substances."

The court construed the Schedule II and Schedule III provisions relating to hydrocodone as indicating legislative intent to preclude charging hydrocodone trafficking for the possession of 40 Lorcet pills containing less than 15 milligrams of hydrocodone. However, this construction seems to beg the question why the Legislature only cited the Schedule II referencing of hydrocodone.

One implication of the *Hayes* decision is that a person can not be charged with trafficking in 40 Lorcet tablets, 400 Lorcet tablets, or 4,000 Lorcet tablets, as long as the "single dosage unit," i.e., each individual tablet, contains 15 milligrams or less of hydrocodone. In *State v. Yu*, the Florida Supreme Court stated that "the legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people than the same amount of undiluted cocaine." Id. at 765. However, the inclusion of mixtures in the hydrocodone trafficking provision and the reference in that provision to Schedule II arguably obviates a similar conclusion regarding hydrocodone and other controlled substances packaged in tablet or pill form. Just as it is less profitable and practicable to market cocaine in its pure form; it is even less profitable and practicable to market hydrocodone separate from the other constituent parts that make up the prescription tablets. The only real distinction between hydrocodone in a mixture and cocaine in a mixture, albeit a distinction without an apparent difference, is that to bring the product to a wider market, the cocaine trafficker cuts the cocaine so more cocaine is available for sale, while the hydrocodone trafficker increases efforts to divert more of the drug (which is contained in a tablet "mixture") into the black market for public consumption.

Another implication of the *Hayes* decision is that it appears to have opened the door to the extension of its holding beyond hydrocodone to effect charging trafficking in other substances. The *Hayes* court extensively discussed the actual amount of hydrocodone in each tablet to determine whether Hayes possessed 15 milligrams or less of hydrocodone. This dicta, while it may have been relevant to the court given its construction of the law applicable to hydrocodone scheduling, has unintentionally resulted in the Fifth District Court of Appeal, citing *Hayes* as support, reaching a different definition of mixture in the context of oxycodone trafficking than the generally accepted scientific definition the Legislature intended when it created the trafficking law. According to the Office of Statewide Prosecution, other cases are presently pending where the same argument is being made.

If the limited holding were further extended to include all mixtures of controlled substances, there might be an ongoing battle of the experts over the qualitative analysis of these substances, putting the State in the untenable position of having "'to make gradations and differentiations and draw distinctions with the precision of a computer'." *State v. Yu*, 400 So.2d at 764, quoting *Illinois v. Mayberry*, 63 Ill.2d 1, 345 N.E.2d 97, 101, *cert denied* 429 U.S. 828 (1976), as quoting *Daneff v. Henderson*, 501 F.2d 1180 (2d Cir. 1974).

D. Methamphetamines

Methamphetamine abuse has been a persistent problem in this country for over 50 years. During World War II, amphetamine was widely used as a stimulant for soldiers. Dextroamphetamine (Dexedrine) and methamphetamine (Methedrine) became readily available. *Drugs of Abuse*, Drug Enforcement Administration (1997) (unless otherwise noted, this is the reference source for this section). Responding to the spread of amphetamine in the 1960s, the federal food and drug laws were amended in 1965 to curb the amphetamine black market. Many pharmaceutical amphetamine products were removed from the market and doctors began prescribing the remaining products less freely. The black market, however, continued to expand, and clandestine laboratory production mushroomed to meet demand, especially methamphetamine laboratories on the West Coast. Clandestine laboratories continue to the present date to be the primary producer of amphetamines distributed in the black market.

In the *1999 Florida Drug Control Strategy*, the Office of Drug Control (ODC) stated that Florida has a growing methamphetamine problem, and noted large seizures of methamphetamine in this state. The ODC also noted that the addictive qualities of this drug, along with the extreme psychotic and violent reactions of users, make methamphetamine a highly dangerous drug.

Methamphetamine is a Schedule II substance under s. 893.03(2)(c)(4), F.S. Under s. 893.13, F.S., which prohibits the possession, purchase, sale, delivery or manufacture of controlled substances listed in s. 893.03, F.S., the penalties for a limited number of offenses under s. 893.13, F.S., are triggered, in part, by the weight of the substance involved. The type of substance involved is relevant to almost every offense under s. 893.13, F.S. Only a limited number of controlled substances, when possessed, purchased, sold, delivered, or manufactured are subject to the greatest penalty, by virtue of the person committing, typically, a first degree felony. Substances listed in s. 893.03(2)(c), F.S., fall in the middle range of penalties by virtue of the person committing, typically, a second degree felony. For example, sale of cocaine (s. 893.03(2)(a), F.S.), within 1,000 feet of a convenience business is a first degree felony; the same sale involving methamphetamine (s. 893.039(2)(c), F.S.), is a second degree felony.

Prior to Florida's Statewide Drug Control Summit 2000, the Office of Drug Control suggested including a proposal to increase methamphetamine penalties as a topic of discussion at the Summit Drug Enforcement Workshop. Like the 1,4 Butanediol proposal, this proposal was added as a topic of discussion, and was discussed and endorsed by the Workshop participants.

E. Stanford v. State

In *Stanford v. State*, 706 So.2d 900 (Fla. 1st DCA 1998), the facts before the appellate court were that Stanford was habitualized because of a conviction for trafficking in 28 or more grams of cocaine, a first degree felony. He received 20 years of imprisonment followed by 15 years of probation. The maximum penalty for a first degree felony is 30 years, absent specific statutory authority for a greater penalty.

Prior to the enactment of the "Three Strikes" legislation (HB 121; chapter 99-188, L.O.F.) this last session, which modified s. 893.135, F.S., the drug trafficking statute, the statute provided that a defendant convicted of certain lower-weight drug trafficking offenses "*shall be sentenced pursuant to the sentencing guidelines* and pay a fine of $50,000." The reference to the sentencing guidelines was deleted by the legislation and replaced with a reference to the Criminal Punishment Code.

The *Stanford* Court interpreted the inclusion of the word "shall" in the italicized provision to require that Stanford be sentenced pursuant to the sentencing guidelines. On the basis of this statutory language, the court held that Stanford could not be sentenced under s. 775.084, F.S., the Habitual Offender Act. The court's holding was primarily based on a "literal meaning" construction of the statutory language.

In so holding the court noted that, in 1993, the Legislature amended s. 775.084, F.S., to exempt drug possession and purchase offenses under s. 893.13, F.S. That same year, the Legislature also amended s. 893.135, F.S., to eliminate mandatory minimum terms for certain lower-weight trafficking offenses, such as trafficking in 28 grams or more of cocaine, and required instead that a defendant convicted of any of these trafficking offenses be sentenced pursuant to the sentencing guidelines.

The court's interpretation of the statute may not account for several important considerations, nor be consistent with the weight of the case law. In 1993, the "sentenced pursuant to the sentencing guidelines" language was inserted in s. 893.135, F.S., and the exemptions for certain drug possession and purchasing offenses were specifically exempted in s. 775.084, F.S. To accept the court's interpretation is to accept as plausible that the Legislature amended s. 775.084, F.S., to specifically exempt one class of drug offenses but chose to employ an indirect approach (the amendment of s. 893.135, F.S.) to exempt another class of drug offenses from s. 775.084, F.S.

To the extent the *Stanford* Court is suggesting that the mandatory penalties eliminated from the trafficking statute in 1993 are analogous to the penalties under s. 775.084, F.S., the analogy is incorrect. Courts were required to impose the mandatory minimum terms under s. 893.135, F.S., prior to the elimination of those terms. The principle underlying such mandatory sentencing is certainty of punishment. Conversely, the habitual felony offender provision of s. 775.084, F.S., which basically doubled the statutory maximum periods under s. 775.082, F.S., is permissive or discretionary, not mandatory. *State v. Hudson*, 698 So.2d 831, 832 (Fla. 1997), citing cases.

In s. 775.084, F.S., the Legislature has expressly authorized the courts to impose a habitual felony offender sentence if the defendant has a current felony offense and has previously been convicted of two or more prior felony offenses in a designated time period relative to the commission of the

current felony offense. The only other limitation on the court's discretion is that the current offense and one of the two prior felony offenses cannot be a possession or purchase offense under s. 893.13, F.S. This language establishes that the use of the word 'may' is merely a means of conferring upon the court the authority to impose a habitual felony offender sentence on a defendant who qualifies for such sentencing. *See e.g., Comcoa, Inc. v. Coe*, 587 So.2d 474, 478 (Fla. 3rd DCA 1991). By so interpreting the language in s. 893.135, F.S., to preclude any sentence other than a guidelines sentence, the *Stanford* Court has effectively limited the courts' exercise of their statutorily conferred authority to impose a habitual felony offender sentence.

The rule of lenity does not appear to be applicable here because the *Stanford* court was not faced with a criminal statute permitting two interpretations. The Legislature enacted s. 775.084, F.S., "to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism." *State v. Rucker*, 613 So.2d 460, 461 (Fla. 1993), quoting *Eutsey v. State*, 383 So.2d 219, 223 (Fla. 1980). The Florida Supreme Court has stated that "[t]he entire focus of the statute [s. 775.084] is not on the present offense, but on the criminal offender's prior record." *Ross v. State*, 601 So.2d 1190, 1193 (Fla. 1992). The habitual felony offender provision is intended to enhance the punishment for the current penalty based on the defendant's extensive criminal history. The enhanced punishment is incident to the defendant's prior felony offenses. The habitual felony offender provision prescribes a longer sentence for the current offense before the court for sentencing.

The Legislature amended s. 775.084, F.S., to provide that "the sentencing guidelines do not apply to habitual offender sentences." *Studnicka v. State*, 679 So.2d 819, 821 (Fla. 3rd DCA 1996); *State v. Kendrick*, 596 So.2d 1153, 1154 (Fla. 5th DCA), *review dismissed* 613 So.2d 5 (Fla. 1992) ("The legislature amended the habitual offender statute to make habitual offender sentencing independent of the sentencing guidelines.").

Under s. 921.001(4)(b)2., F.S. (1995), the particular provision of s. 921.001, F.S., that appears to be relevant to Stanford's offense date, "[t]he 1994 guidelines apply to sentencing for all felonies, except capital felonies committed on or after January 1, 1994." This statement appears to be no less directive and mandatory than the language the *Stanford* court relies on in s. 893.135, F.S., even absent the inclusion of the word "shall," which is not a requirement to make a statute mandatory in nature. However, the courts have understood that this provision applies to "original sentencing"; this provision does not supersede the authority conferred upon the courts under s. 775.084, F.S., to impose a habitual felony offender sentence on a defendant who qualifies for such sentencing. *See, e.g., Studnicka*, 679 So.2d at 822 ("The legislature has unequivocally said that the guidelines now cover only ordinary sentencing, not habitual offender sentencing.").

While the *Stanford* court employed one established rule of statutory construction, it did not employ another established rule. "It is well-settled that, according to the context and surrounding circumstances, a statutory 'shall' is to be read as a 'may' *and vice versa*." *Comcoa*, 587 So.2d at 477 (emphasis supplied).

F. Nitrous Oxide and Drug Paraphernalia

Nitrous oxide, commonly known as "laughing gas," is an oxygenated compound (dinitrogen monoxide). The primary, legitimate use of nitrous oxide today is by doctors and dentists for

general anesthesia**.** Relevant to the illicit use of nitrous oxide, this substance is generally grouped with other anesthetics under the general category of "inhalants." Within the subgrouping of anesthetics, nitrous oxide is the principal substance of abuse.

Section 877.111(1), F.S., provides that it is unlawful for any person to inhale or ingest, or to possess with the intent to breathe, inhale, or drink any compound, liquid, or chemical containing one of a specified list of 15 substances, including nitrous oxide, for the purpose of inducing a condition of intoxication or which distorts or disturbs the auditory, visual or mental processes. Exempted from this subsection is use of these substances as part of the care or treatment of a disease or injury by a practitioner licensed under chapters 458, 459, 464, or 466, F.S., or to beverages controlled by the provisions of chapters 561, 562, 563, 564, or 565, F.S.

Section 877.111(2), F.S., provides that it is unlawful for any person to possess, buy, sell, or otherwise transfer any substance specified in subsection (1) for the purpose of inducing or aiding any other person to violate the provision of subsection (1). Section 877.111(3), F.S., provides that any violation of subsections (1) or (2) is a second degree misdemeanor.

According to one news report, inhalants, including nitrous oxide, "have been widely used in the underground club scene for at least three decades, but are now being used among the more mainstream party crowds in clubs." Parvaz, "Inhalants are common, yet especially dangerous," Seattle Post-Intelligencer Reporter, August 3, 1999.

For medical use, nitrous oxide is compressed and stored in metal tanks to which a hose and mask are attached. Nitrous oxide tanks used for illicit nitrous oxide use are typically procured by street dealers through burglaries of medical/dental offices and distributors, illegally obtaining a legitimate nitrous oxide use permit, or misrepresenting themselves as legitimate users. Some auto supply stores also have tanks of nitrous oxide. Other means of obtaining nitrous oxide are through pressurized food dispensing containers and nitrous oxide dispensers ("whippets"), small canisters used for making homemade whipping cream. Both can be legally obtained. Whippets can be procured at gourmet food shops, "head shops," restaurant supply stores, hardware stores, and through Internet mail-order services. A box of twenty four whippets can be purchased from a store for approximately 12 to 14 dollars. These canisters contain four to eight grams of nitrous oxide.

Nitrous oxide can be inhaled from a tank by use of a hose and a mask. Columbia University Health Education Program. The gas can also be inhaled from balloons filled from tanks or canisters. Id. Dealers typically charge three to five dollars for each balloon. The gas in a whippet fills approximately one balloon, the amount a typical user would inhale at one time. Pressurized cans of whipped cream can also be held and the valve pressed in such a way to permit only release of the propellant. Wisconsin Clearinghouse for Prevention Resources. Other methods of transmission include releasing the gas in a room or automobile and placing a plastic bag filled with the gas over the person's head. Columbia University, supra.

Section 893.147(1)(b), F.S., in part, provides that it is a first degree misdemeanor for a person to use, or possess with intent to use, drug paraphernalia to ingest or inhale a controlled substance in violation of chapter 893, F.S. Subsection (2)(b), in part, provides that it is a third degree felony for a person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug

paraphernalia, knowing, or under circumstances where one should reasonably know, that it will be used to ingest or inhale a controlled substance in violation of chapter 893, F.S. Subsection (3) provides that it is a second degree felony for any person 18 years of age or over to violate subsection (2) by delivering drug paraphernalia to a person under 18 years of age.

Section 893.145, F.S., defines "drug paraphernalia." The definition includes, in part, all equipment, products and materials of any kind which are used, intended for use, or designed for use in producing, storing, containing, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of chapter 893, F.S. An extensive, but not exclusive, list of objects follows. Most of the objects are defined where there might be some question about what the object is, though this is not a hard and fast rule. For example, "chillers" may be understood only by a minority of persons comprised of law enforcement, attorneys, judges, and persons involved in the drug trade or using this object. The particular objects listed do not capture objects used to facilitate the illegal inhalation of nitrous oxide.

Section 893.148, F.S., provides a list of factors that shall be taken into account by the court or jury, in addition to all other logically relevant factors, in determining whether an object is drug paraphernalia. For example, the proximity of the object to controlled substances and the existence of any residue of controlled substances on the object are relevant factors that must be considered.

G. Authorization for Probation Sentence for Certain Repeat Drug Offenders

Section 948.034, F.S., authorizes the courts to impose a sentence of probation in lieu of imprisonment for certain drug offenders, including repeat drug offenders who deal in acetyl-alpha-methfentanyl, acetylmethadol, and 4-methylaminorex, all of which are Schedule I controlled substances. The court can impose a period of probation, as specified, for a second violation involving acetyl-alpha-methfentanyl or 4-methylaminorex, and for a third or fourth violation involving acetylmethadol.

III. Effect of Proposed Changes:

This bill amends various sections of the Florida law to facilitate prosecution and punishment of offenses involving "designer drugs" and other drugs.

The Bill does the following:

- Amends s. 893.02, F.S., to define "mixture" as "any physical combination of two or more substances."

- Amends s. 893.03, F.S., to reschedule Dronabinol (synthetic THC) as a Schedule III controlled substance. The section also schedules 1,4 Butanediol as a Schedule II controlled substance, thereby facilitating prosecution of offenses involving this substance. Finally, the section removes the Schedule III reference to hydrocodone so that hydrocodone is strictly a Schedule II controlled substance.

- Amends s. 893.13, F.S., to place the scheduling reference to methamphetamine (s. 893.03(2)(c)4., F.S.), in the highest penalty provisions of s. 893.13, F.S., relevant to a

number of drug offenses. For example, under current law, sale of a controlled substance scheduled in s. 893.03 (1)(a), (1)(b), (1)(d), (2)(a), or (2)(b), within 1,000 feet of a convenience business is a first degree felony. The Bill would add reference to (2)(c)4., thereby making it a first degree felony to possess methamphetamine within 1,000 feet of a convenience business.

- Amends s. 893.135, F.S., to create three new trafficking offenses and modify a current trafficking offense:
  - Creating the offense of trafficking in GHB
    - 1 kilogram or more but less than 5 kilograms. Mandatory minimum term of 3 years and $50,000 fine.
    - 5 kilograms or more but less than 10 kilograms. Mandatory minimum term of 7 years and $100,000 fine.
    - 10 kilograms or more. Mandatory minimum term of 15 years and $250,000 fine.
    - 150 kilograms or more. The person knows the probable result of the manufacture or importation of the GHB would be the death of any person. Capital felony and $250,000 fine.
  - Creating the offense of trafficking in 1,4 Butanediol
    - 1 kilogram or more but less than 5 kilograms. Mandatory minimum term of 3 years and $50,000 fine.
    - 5 kilograms or more but less than 10 kilograms. Mandatory minimum term of 7 years and $100,000 fine.
    - 10 kilograms or more. Mandatory minimum term of 15 years and $250,000 fine.
    - 150 kilograms or more. The person knows the probable result of the manufacture or importation of the 1,4 Butanediol would be the death of any person. Capital felony and $250,000 fine.
  - Creating the offense of trafficking in Phenthylamines (includes MDMA or "Ecstasy" and homologous substances which are scheduled in s. 893.03(1)(c), F.S.)
    - Phenethylamines consist of any of the following substances individually, or in combination, or in any mixture:
      - 3,4-Methylenedioxymethamphetamine (MDMA)

- 4-Bromo-2, 5-dimethoxyamphetamine
- 4-Bromo-2, 5-dimethoxyphenethylamine
- 2,5-Dimethoxyamphetamine
- 2,5-Dimethoxy-4-ethylamphetamine (DOET)
- N-ethylamphetamine
- N-Hydroxy-3, 4-methylenedioxyamphetamine
- 5-Methoxy-3, 4-methylenedioxyamphetamine
- 4-methoxyamphetamine
- 4-Methyl-2, 5-dimethoxyamphetamine
- 3,4-Methylenedioxy-N-ethylamphetamine
- 3,4 Methylenedioxyamphetamine
- N,N-dimethylamphetamine
- 3,4,5-Trimethoxyamphetamine

- 10 grams or more but less than 200 grams. Mandatory minimum term of 3 years and $50,000 fine.

- 200 grams or more but less than 400 grams. Mandatory minimum term of 7 years and $100,000 fine.

- 400 grams or more. Mandatory minimum term of 15 years and $250,000 fine.

- 30 kilograms or more. The person knows the probable result of the manufacture or importation of the phenethylamines would be the death of any person. Capital felony and $250,000 fine.

- Amends the current capital felony trafficking offense involving importation into this state of 400 grams or more of amphetamine, methamphetamine, or certain, specified mixtures to include the manufacture of 400 grams or more of such substances.

- Deletes the current language included in reference to sentencing under the Criminal Punishment Code for various lower-weight trafficking offenses and provides that the offenses are punishable as provided in s. 775.082, F.S., s. 775.083, F.S., or s. 775.084, F.S. The effect of this change is to allow habitual offender sentencing, which might otherwise be precluded by the First District Court of Appeal's interpretation of the former language providing for sentencing pursuant to the sentencing guidelines, and the extension of this holding to effect the similar language in the current law which provides that sentencing is pursuant to the Criminal Punishment Code. The change does not preclude sentencing under a Code scored sentence or other sentence greater than the mandatory minimum term.

- Amends s. 893.145, F.S., to add to the list of specifically mentioned objects that may constitute drug paraphernalia. The added objects are associated with the equipment used to facilitate inhalation of nitrous oxide. Cartridges and canisters, as well as tanks, are used to contain nitrous oxide. A charger, sometimes referred to as a "cracker," a

charging bottle and a whip-it are used to expel nitrous oxide. Duct tape secures hoses or tubes to tanks. Two-liter soda bottles and balloons are filled with nitrous oxide.

- Amends s. 775.087, F.S. ("10-20-Life"), to specifically reference the new offenses, though they would also be covered under this section by virtue of the statutory reference to the drug trafficking section.

- Amends s. 921.0022, F.S., to rank all of the new (non-capital) trafficking offenses in levels 7, 8, or 9, of the Criminal Punishment Code offense ranking chart, depending upon the particular weight of the controlled substance involved.

- Amends s. 948.034, F.S., to remove the authority conferred on the court by virtue of this section to impose a sentence of probation in lieu of imprisonment on a drug offender with repeat violations involving specified Schedule I controlled substances.

- For the purpose of incorporating amendments to various sections, reenacts the following sections of the Florida Statutes: 39.01(30)(a); 316.193(5); 327.35(5); 397.451(7); 414.095(1); 440.102(11)(b); 772.12(2); 782.04(1)(a), (3) and (4); 817.563; 831.31; 856.015(1)(d); 893.0356(2)(a); 893.12(2)(b), (c) and (d); 893.1351(10; 903.133; 907.041((4)(b); 921.0024(1)(b); 921.142(2); 943.0585; and 943.059.

- Provides that the effective date of the Bill is October 1, 2000.

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:

This bill has been reviewed by the Criminal Justice Estimating Conference. The Conference forecast an indeterminate impact on the need for prison beds as a result of this legislation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.