

STORAGE NAME: h1691.hcc.doc

DATE: April 18, 2001

HOUSE OF REPRESENTATIVES

**COUNCIL FOR HEALTHY COMMUNITIES
ANALYSIS**

BILL #: HB 1691

RELATING TO: Law Enforcement Officers

SPONSOR(S): Representative(s) Atwater

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME PREVENTION, CORRECTIONS, AND SAFETY YEAS 7 NAYS 0
 - (2) COUNCIL FOR HEALTHY COMMUNITIES YEAS 13 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

House Bill 1691 amends s. 817.564, F.S., relating to imitation controlled substances, to provide that civil or criminal liability may not be imposed by virtue of this section against a law enforcement officer engaged in a bona fide drug investigation in which the officer possess, manufactures, dispenses, sells, gives, or distributes an imitation controlled substance as part of the investigation.

This bill substantially amends s. 817.564, F.S.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Subsection (1) of s. 817.564, F.S., defines an "imitation controlled substance" as a pill, capsule, tablet, or substance in any form whatsoever which is not a controlled substance enumerated in ch. 893, F.S., which is subject to abuse, and which:

- ▶ By overall dosage unit appearance, including color, shape, size, markings, and packaging, or by representations made, would cause the likelihood that such a pill, capsule, tablet, or substance will be mistaken for a controlled substance unless such substance was introduced into commerce prior to initial introduction into commerce of the controlled substance which it is alleged to imitate; or
- ▶ By express or implied representations, purports to act like a controlled substance as a stimulant or depressant of the central nervous system and which is not commonly used or recognized for use in that particular formulation for any purpose other than for such stimulant or depressant effect, unless marketed, promoted, or sold as permitted by the United States Food and Drug Administration.

Subsection (3) of s. 817.564, F.S., makes it a third degree felony to manufacture, distribute, sell, or give an imitation controlled substance. Subsection (4) makes it a third degree felony for a person 18 years of age or older to knowingly sell or distribute an imitation controlled substance. Subsection (5) makes it a first degree misdemeanor for a person to place in any newspaper, magazine, handbill, or other publication, or to post or distribute in any public place any advertisement or solicitation with reasonable knowledge that purpose of the advertisement or solicitation is to promote the distribution of imitation controlled substances.

Subsection (6) of s. 817.564(6), F.S., provides that no civil or criminal liability shall be imposed by virtue of s. 817.564, F.S., on any person operating in accordance with the Florida Comprehensive Drug Abuse Prevention and Control Act who manufactures, dispenses, sells, gives, or distributes an imitation controlled substance for use as a placebo by a licensed practitioner in the course of professional practice or research.

Subsection (6) does not exempt from civil or criminal liability a law enforcement officer engaged in an active criminal investigation in which the officer is possessing, dispensing, selling, giving, or distributing an imitation controlled substances (typically a "reverse sting operation") as part of that investigation. No other section of Florida law provides for such an exception, including: s. 893.13(8)(h), F.S., which provides that the penalty provisions of s. 893.13, F.S., are not applicable to the delivery to, or actual or constructive possession of controlled substances by law enforcement officers for bona fide law enforcement purposes in the course of an active criminal investigation; or s. 893.09(5), F.S., which provides that no civil or criminal immunity shall be imposed by virtue of ch. 893, F.S., the controlled substances chapter, upon any person whose duty it is to enforce this chapter.

This liability issue was recently addressed by the Fourth District Court of Appeal in *Hamon v. Florida*, 744 So.2d 1065 (Fla. 4th DCA 1999), *rev. den.*, 760 So.2d 946 (Fla. 2000). The court was not specifically reviewing the issue of whether the sale of counterfeit cocaine to Harmon by undercover officers engaged in a reverse sting operation was illegal under s. 817.564, F.S., but in the context of reviewing whether, under s. 817.564, F.S., Harmon's due process rights were violated when the police sold him the counterfeit cocaine (the actual issue on appeal), the court stated that it was undisputed that s. 817.564, F.S., does not provide an exemption for the sale of imitation controlled substances by law enforcement officers acting in a criminal investigation, and, as such, the sale of the counterfeit cocaine was illegal under this section.

The court believed that the issue of a lack of such an exemption for imitation controlled substances should be placed on the legislative agenda so as to avoid further attacks from other jurisdictions. In closing, the court stated:

. . . [W]e fail to find one logical reason why the legislature would not approve of the police selling counterfeit cocaine when they have already approved of them selling real cocaine. Nor can we even fathom any controversy among our legislators regarding the use of a safe counterfeit cocaine in the place of real cocaine.

Id. at 1068 (footnote omitted)

C. EFFECT OF PROPOSED CHANGES:

House Bill 1691 amends s. 817.564, F.S., relating to imitation controlled substances, to provide that civil or criminal liability may not be imposed by virtue of this section against a law enforcement officer acting in the officer's official capacity during the course of an active criminal investigation relating to controlled substances which is approved or authorized by the officer's agency or to an informer or third party acting under the direction or control of such an officer as part of an authorized, active criminal investigation relating to controlled substances.

The effect of the bill is that law enforcement officers engaged in bona fide drug crime investigations will not be subject to potential civil or criminal liability under s. 817.564, F.S., for possessing, manufacturing, dispensing, selling, giving, or distributing an imitation controlled substance as part of the investigation.

The bill takes effect upon becoming a law.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

House Bill 1691 may result in a cost savings by eliminating the due process issue addressed in *Hamon, supra*, as an appealable issue, and exempting law enforcement officers engaged in bona fide drug crime investigations from potential civil or criminal liability under s. 817.564, F.S.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME PREVENTION, CORRECTIONS, AND SAFETY:

Prepared by:

Staff Director:

Allen Mortham, Jr.

David DeLaPaz

AS REVISED BY THE COUNCIL FOR HEALTHY COMMUNITIES:

Prepared by:

Council Director:

Allen Mortham, Jr.

Mary Pat Moore