

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.)

BILL: CS/CS/SB 640

SPONSOR: Committees on Judiciary and Health, Aging and Long-Term Care and Senator Burt

SUBJECT: Criminal Offenses/Health Care Practitioners; Controlled Substances

DATE: February 12, 2002 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|----------------|------------|---------------------|
| 1. | <u>Munroe</u> | <u>Wilson</u> | <u>HC</u> | <u>Favorable/CS</u> |
| 2. | <u>Forgas</u> | <u>Johnson</u> | <u>JU</u> | <u>Favorable/CS</u> |
| 3. | _____ | _____ | <u>CJ</u> | _____ |
| 4. | _____ | _____ | <u>APJ</u> | _____ |
| 5. | _____ | _____ | <u>AP</u> | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

The bill provides that in any criminal proceeding against a person who is licensed by the Department of Health to practice a health care profession in Florida, a representative of the department may voluntarily appear and furnish pertinent information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote justice or protect the public. The bill authorizes the court to require a representative of the Department of Health to appear if the criminal proceeding relates to the qualifications, functions, or duties of the health care professional.

The bill enhances the penalty applicable to the existing offense for withholding information from a practitioner from whom a person seeks to obtain a controlled substance or a prescription for a controlled substance. Failure to notify a practitioner that the person has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the last 30 days is changed from a first degree misdemeanor to a third degree felony offense. The bill creates third degree felony offenses for a health care practitioner to knowingly assist a person in obtaining a controlled substance through fraud; employ a trick or scheme to assist a person to obtain a controlled substance; prescribe a controlled substance for a fictitious person; or prescribe a controlled substance for purposes of monetary benefit. The bill provides that any prescribing practitioner who commits such an offense is liable for a second-degree felony if the practitioner received \$1,000 or more in payment or if the quantity of the controlled substance prescribed meets the threshold for the offense of drug trafficking.

The bill provides that when a health care practitioner writes a prescription that is not medically necessary, or is in excess of what is medically necessary, then that fact may be considered with other competent evidence in determining whether the practitioner knowingly assisted the patient in obtaining a controlled substance through deceptive, untrue, or fraudulent representations. The

bill expressly provides that this provision does not create a presumption that the practitioner knowingly assisted the patient in obtaining a controlled substance through deceptive, untrue, or fraudulent representations.

The bill amends the law to revise the offense severity ranking chart to move the offenses for affixing a false or forged label to a package of controlled substances and the offense for withholding information from a practitioner regarding the previous receipt of, or prescription for, a controlled substance from level 1 to level 3. In addition, offenses created in the bill that prohibit a prescribing practitioner from specified acts are ranked as level 3 offenses on the offense severity ranking chart.

This bill creates section 456.075, Florida Statutes.

This bill amends ss. 893.13, 921.0022, and 921.187, F.S.

II. Present Situation:

Controlled Substances

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act. The chapter classifies controlled substances into five schedules in order to regulate the manufacture, distribution, preparation, and dispensing of the substances. Substances in Schedule I have a high potential for abuse and have no currently accepted medical use in the United States. Schedule II drugs have a high potential for abuse and a severely restricted medical use. Cocaine and morphine are examples of Schedule II drugs. Schedule III controlled substances have less potential for abuse than Schedule I or Schedule II substances and have some accepted medical use. Substances listed in Schedule III include anabolic steroids, codeine, and derivatives of barbituric acid. Schedule IV and Schedule V substances have a low potential for abuse, compared to substances in Schedules I, II, and III, and currently have accepted medical use. Substances in Schedule IV include phenobarbital, librium, and valium. Substances in Schedule V include certain stimulants and narcotic compounds. The chapter defines practitioner to mean a licensed medical physician, a licensed dentist, a licensed veterinarian, a licensed osteopathic physician, a licensed naturopathic physician, or a podiatrist, if such practitioner holds a valid federal controlled substance registry number.

Section 893.13(7)(a)1.-8., F.S., provides that each of the following acts constitutes a misdemeanor of the first degree, punishable by jail time of up to 1 year and a fine of up to \$1,000 and any second or subsequent violation is currently punishable as a third degree felony: distributing or dispensing a controlled substance in violation of ch. 893, F.S.; refusing or failing to make, keep, or furnish any record, notification, order form, statement, invoice, or information required by ch. 893, F.S.; refusing entry into any premises for inspection or refusing to allow an inspection; distributing a controlled substance named or described in Schedule I or Schedule II except pursuant to an order form; keeping or maintaining any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, other structure or place which is resorted to by persons using controlled substances in violation of ch. 893, F.S., for the purpose of using these substances, or which is used for keeping or selling them in violation of ch. 893, F.S.; using to his or her personal advantage, or to reveal, any information obtained in a prosecution or administrative

hearing for a violation of ch. 893, F.S.; withholding information from a practitioner from whom the person seeks to obtain a controlled substance or a prescription for a controlled substance that the person has received a controlled substance or a prescription for a controlled substance from another practitioner within the last 30 days; and possessing a prescription form which has not been completed and signed by the practitioner whose name appears printed thereon, unless the person is that practitioner, is a pharmacist, or is a supplier of prescription forms who is authorized by that practitioner to possess those forms.

Section 893.13(7)(a) 9.-11., F.S., specifies that the following offenses are punishable as a third degree felony: acquiring or obtaining, or attempting to acquire or obtain, possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; affixing any false or forged label to a package or receptacle containing a controlled substance; and furnishing false or fraudulent material information in, or omit any material information from, any report or other document required to be kept or filed under ch. 893, F.S., or any record required to be kept by ch. 893, F.S.

Section 893.13(8), F.S., provides that the criminal provisions in s. 893.13(1)-(7), F.S., are not applicable to the delivery to, or actual constructive possession for medical or scientific use or purpose only of controlled substances by, persons included in any of the following classes, or the agents or employees of such persons, for use in the *usual course of their business or profession or in the performance of their official duties which include*: pharmacists; practitioners; persons who procure controlled substances in good faith and in the course of professional practice only, by or under the supervision of pharmacists or practitioners employed by them, or for the purpose of lawful research, teaching, or testing, and not for resale; hospitals that procure controlled substances for lawful administration by practitioners, but only for use by or in the particular hospital; officers or employees of state, federal, or local governments acting in their official capacity only, or informers acting under their jurisdiction; common carriers; manufacturers, wholesalers, and distributors; or law enforcement officers for bona fide law enforcement purposes in the course of an active criminal investigation.

Section 893.135, F.S., specifies a number offenses relating to the trafficking of controlled substances. Several drugs such as morphine, opium oxycodone, hydrocodone, hydromorphone, or any salt of an isomer thereof that are sold, purchased, manufactured, delivered or brought into Florida within specified threshold amounts are classified within the felony offenses for “trafficking in illegal drugs.”

Criminal Offenses

Under the Criminal Punishment Code (or Code) codified in ch. 921, F.S., all felony offenders whose offenses were committed on or after October 1, 1998, must be sentenced pursuant to the Code. The Code allows the trial judge to sentence any felony offender to the statutory maximum for the offense degree. A third degree felony is punishable by a maximum prison sentence of 5 years and a maximum fine of \$5,000 under ss. 775.082 and 775.083, F.S. Section 921.0024, F.S., provides for a “lowest permissible sentence” below which the judge may not sentence an offender without providing written reasons. Section 921.0024, F.S., provides that the minimum sentence is calculated by computing various factors like victim injury and prior record. Section 921.0022, F.S., sets forth an offense severity ranking chart which ranks most felony offenses

from levels 1 to 10. The severity ranking is the primary factor which is used with the minimum sentence calculation. A level 10 offense scores highest; level 1 and level "M" score lowest.

Section 921.0022(3)(a), F.S., ranks the offenses for affixing any false or forged label to a package or receptacle containing a controlled substance as a level 1 offense. A first time offender who has committed no additional offense and did not injure his or her victim, scores a "lowest permissible sentence" of any non-state prison sanction which may include probation, community control, or a county jail sentence of less than 1 year. Offenses relating to violations of ch. 893, F.S., relating to controlled substances which constitute a third degree felony, although not specifically listed in the offense severity ranking chart, are ranked as a level 1 offense by virtue of the default provision in s. 921.0023, F.S.

III. Effect of Proposed Changes:

Section 1. Creates s. 456.075, F.S., to provide that in any criminal proceeding against a person who is licensed by the Department of Health to practice a health care profession in Florida, a representative of the department may voluntarily appear and furnish pertinent information, make recommendations regarding specific conditions of probation, or provide any other assistance necessary to promote justice or protect the public. The court may order a representative of the Department of Health to appear in any criminal proceeding if the crime charged is substantially related to the qualifications, functions, or duties of a health care professional licensed by the department.

Section 2. Amends s. 893.13, F.S., relating to prohibited acts and penalties under the controlled substances act, to enhance the penalty applicable to the existing offense for withholding information from a practitioner from whom a person seeks to obtain a controlled substance or a prescription for a controlled substance. Failure to notify a practitioner that the person has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the last 30 days is changed to a third degree felony punishable by imprisonment of up to 5 years and the imposition of a fine of up to \$15,000. The offense is currently punishable as a first degree misdemeanor which carries up to one year of jail and a fine of \$1,000, and any second or subsequent violation is currently punishable as a third degree felony.

New offenses are created that prohibit a prescribing practitioner from: knowingly assisting a patient, other person, or the owner of an animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations in or related to the practice of the prescribing practitioner's professional practice; employing a trick or scheme in the practice of the prescribing practitioner's professional practice to assist a patient, other person, or the owner of an animal in obtaining a controlled substance; knowingly writing a prescription for a controlled substance for a fictitious person; or writing a prescription for a controlled substance for a patient, other person, or an animal if the sole purpose of writing such prescription is to provide a monetary benefit to, or obtain a monetary benefit for, the prescribing practitioner. Any prescribing practitioner who violates these offenses commits a third degree felony punishable by imprisonment of up to five years and the imposition of a fine of up to \$5,000. If a prescribing practitioner has committed any of these offenses and received \$1,000 or more in payment for writing one or more prescriptions or, in the case of a prescription written for a controlled

substance described in s. 893.135, F.S., has written one or more prescriptions for a quantity of a controlled substance which, individually or in the aggregate, meets the threshold for the offense of trafficking in a controlled substance under s. 893.15, F.S., the violation is reclassified as a second degree felony punishable by imprisonment of up to 15 years and the imposition of a fine of up to \$15,000 and ranked in level 4 of the Criminal Punishment Code.

If the prescribing practitioner wrote a prescription or multiple prescriptions for a controlled substance for the patient, other person, or animal for which there was no medical necessity, or that was in excess of what was medically necessary, to treat the patient, other person, or animal that fact does not give rise to any presumption that the practitioner knowingly assisted the patient, other person, or the owner of an animal to obtain a controlled substance through deceptive, untrue, or fraudulent representations. However, this fact may be considered with other competent evidence in determining whether the prescribing practitioner knowingly assisted the patient, other person, or owner of an animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations. This appears to be a permissive inference as opposed to a mandatory rebuttable presumption.¹

Section 3. Amends s. 921.0022, F.S., to revise the offense severity ranking chart to move the offense for affixing a false or forged label to a package of controlled substances and the offense for withholding information from a practitioner regarding the previous receipt of, or prescription for, a controlled substance from level 1 to level 3. In addition, offenses created in the bill that prohibit a prescribing practitioner from: knowingly assisting a patient, other person, or the owner of an animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations in or related to the practice of the prescribing practitioner's professional practice; employing a trick or scheme in the practice of the prescribing practitioner's professional practice to assist a patient, other person, or the owner of an animal in obtaining a controlled substance; knowingly writing a prescription for a controlled substance for a fictitious person; or writing a prescription for a controlled substance for a patient, other person, or an animal if the sole purpose of writing such prescription is to provide a monetary benefit to, or obtain a monetary benefit for, the prescribing practitioner are ranked as level 3 offenses on the offense severity ranking chart.

Section 4. Amends s. 921.187, F.S., relating to disposition and sentencing, alternatives and restitution, to correct cross-references to provisions in s. 893.13, F.S., as amended by the bill.

Section 5. Provides that the bill shall take effect July 1, 2002.

¹ A permissive inference allows, but does not require, the trier of fact to infer an elemental fact upon proof of a basic fact and places no burden on the defendant. *Marcolini v. State*, 673 So.2d 3, 4 (Fla. 1996) A permissive inference is distinguishable from a mandatory rebuttable presumption which requires the trier of fact to presume an element of a crime upon proof of a basic or evidentiary fact unless the defendant comes forward with evidence to rebut the finding of that element. *Francis v. Franklin* 471 U.S. 307, 314 n. 2, 105 S.Ct. 1965, 1971 n. 2, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 517, 99S.Ct. 2450, 2456, 61 L.Ed.2d 39 (1979); *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 157, 99S.Ct. 2213, 2225, 60 L.Ed.2d 777 (1979). Such a presumption violates a defendant's due process rights by relieving the State of the burden of persuasion.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, s. 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill enhances the penalty applicable to the existing offense for withholding information from a practitioner from whom a person seeks to obtain a controlled substance or a prescription for a controlled substance to a third degree felony punishable by imprisonment of up to 5 years and the imposition of a fine of up to \$15,000. In addition the bill creates several new criminal offenses that prohibit a prescribing practitioner from specified acts. Section 921.001, F.S., requires any legislation that creates a felony offense, enhances a misdemeanor offense to a felony or reclassifies an existing felony offense to a greater felony classification to result in a net zero sum impact in the overall prison population as determined by the Criminal Justice Estimating Conference, unless the legislation contains a sufficient funding source to accommodate the change, or the Legislature abrogates the application of s. 921.001, F.S. To the extent the bill enhances the applicable penalty for an existing offense from a misdemeanor to a felony and creates several felony offenses applicable to prescribing practitioners, it may have a fiscal impact based on its impact on the overall prison population as determined by the Criminal Justice Estimating Conference under procedures established in s. 216.136(5), F.S. As of this date, there are no official projections from the Criminal Justice Estimating Conference but the conference estimates there will be an insignificant impact on the need for prison beds.

The Agency for Health Care Administration (AHCA) contends the CS will have a fiscal impact upon the agency. According to AHCA, it is difficult to estimate the number of criminal proceedings in which a Department of Health (DOH) representative may appear, or be directed to appear by the court, to offer recommendations on probation terms or other information that would promote justice or protect the public. Information supplied by AHCA reveals that, in the past two fiscal years, the health case boards found probable cause to pursue discipline on 158 licensees for violations involving criminal convictions related to the practice of the profession or the ability to practice the profession. Additionally, in fiscal year 2000-2001, the Board of Medicine alone disciplined 34 physicians for controlled substance abuses not involving criminal convictions.

AHCA envisions the CS creating the need for a liaison position that would be dedicated to establishing and maintaining a relationship between the criminal courts and the interests of practitioner regulation. AHCA contends the CS will require one full time senior attorney and one full time administrative assistant 1. AHCA believes the CS contemplates significant travel with the appearance of the attorney at court-ordered court appearances and court appearances deemed appropriate by DOH. Additionally, AHCA contends the attorney will have non-recurring travel expenses during the first year arising from conferences with prosecutors and the courts to educate them and establish a system for presenting documentary evidence or testimony. AHCA estimates this will result in a fiscal impact of \$138,477 during the first year and \$119,565 during the following fiscal year.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.