

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL: CS/SB 1718

INTRODUCER: Judiciary Committee and Senator Crist

SUBJECT: Controlled Substances

DATE: April 24, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Daniell</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides that it is a second-degree felony to use, or possess with intent to use, drug paraphernalia to manufacture, compound, convert, produce, process, or prepare methamphetamine in violation the Florida Comprehensive Drug Abuse Prevention and Control Act, codified in ch. 893, F.S. The bill also classifies the use or possession of drug paraphernalia related to the production of methamphetamine as a level 7 offense in the Criminal Punishment Code offense severity ranking chart.

This bill includes salvinorin A on the list of controlled substances in Schedule I.

This bill substantially amends the following sections of the Florida Statutes: 893.03, 893.147, and 921.0022.

II. Present Situation:

Drug Paraphernalia

Florida law provides a tripartite definition of the term “drug paraphernalia.” First, s. 893.145, F.S., generally defines what the term means. Second, s. 893.146, F.S., provides a non-exclusive list of factors for determining whether an object is drug paraphernalia. Third, s. 893.147, F.S., provides penalties for the use, possession, manufacture, delivery, transportation, and advertisement of drug paraphernalia.

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 substance¹ in violation of [ch. 893, F.S.,] or s. 877.111, F.S.”² Further, s. 893.145, F.S., provides the following non-exclusive list of items that fall within the statutory definition of “drug paraphernalia”:³

- (1) Kits used, intended for use, or designed for use in the planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.
- (2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.
- (3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.
- (4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.
- (5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.
- (6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances.
- (7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.
- (8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.
- (9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.
- (10) Containers and other objects used, intended for use, or designed for use in storing, concealing, or transporting controlled substances.
- (11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.
- (12) 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:
 - (a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes, with or without screens, permanent screens, hashish heads, or punctured metal bowls.
 - (b) Water pipes.
 - (c) Carburetion tubes and devices.
 - (d) Smoking and carburetion masks.
 - (e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.
 - (f) Miniature cocaine spoons, and cocaine vials.

¹ Section 893.02(4), F.S., defines a “controlled substance” as “any substance named or described in Schedules I-V of s. 893.03, [F.S.]”

² Section 877.111, F.S., proscribes the inhalation, ingestion, possession, sale, purchase, or transfer of harmful chemical substances.

³ This section further provides that drug paraphernalia is contraband and is subject to civil forfeiture.

- (g) Chamber pipes.
- (h) Carburetor pipes.
- (i) Electric pipes.
- (j) Air-driven pipes.
- (k) Chillums.
- (l) Bongs.
- (m) Ice pipes or chillers.
- (n) A cartridge or canister, which means a small metal device used to contain nitrous oxide.
- (o) A charger, sometimes referred to as a "cracker," which means a small metal or plastic device that contains an interior pin that may be used to expel nitrous oxide from a cartridge or container.
- (p) A charging bottle, which means a device that may be used to expel nitrous oxide from a cartridge or canister.
- (q) A whip-it, which means a device that may be used to expel nitrous oxide.
- (r) A tank.
- (s) A balloon.
- (t) A hose or tube.
- (u) A 2-liter-type soda bottle.
- (v) Duct tape.

In determining whether an object is drug paraphernalia, a court or jury must consider, in addition to all other logically relevant factors, the following:

- Statements by an owner or by anyone in control of the object concerning its use.
- The proximity of the object, in time and space, to a direct violation of this act.
- The proximity of the object to controlled substances.
- The existence of any residue of controlled substances on the object.
- Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he or she knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.
- Instructions, oral or written, provided with the object concerning its use.
- Descriptive materials accompanying the object which explain or depict its use.
- Any advertising concerning its use.
- The manner in which the object is displayed for sale.
- Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor of or dealer in tobacco products.
- Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.
- The existence and scope of legitimate uses for the object in the community.

- Expert testimony concerning its use.⁴

Section 893.147(1), F.S., provides that it is a first-degree misdemeanor to use or possess, with intent to use, drug paraphernalia:

- To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of ch. 893, F.S.; or
- To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of ch. 893, F.S.

However, it is a third-degree felony to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used for the acts described above.⁵ If a person violates s. 893.147(2), F.S., by delivering drug paraphernalia to a minor, the person commits a second-degree felony.⁶

A person commits a first-degree misdemeanor by selling or otherwise delivering hypodermic syringes, needles, or other such objects to a minor, with some lawful dispensing exceptions.⁷

Section 893.147(4), F.S., provides that it is a third-degree felony to use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia, knowing, or under circumstances in which one reasonably should know, that it will be used to transport contraband⁸ or a controlled substance in violation of ch. 893, F.S.

Finally, s. 893.147(5), F.S., provides that it is a first-degree misdemeanor to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

Case Law Interpreting Florida's Drug Paraphernalia Statutes

The state has the burden of proving the requisite elements of crimes involving drug paraphernalia. In order to prove possession of drug paraphernalia, the state must show that the offender had in his possession drug paraphernalia and that he had knowledge of its presence.⁹ The state may also show constructive possession by proving the offender had dominion and control over the contraband, knew of the presence of the contraband, and knew of the illicit nature of the contraband.¹⁰ In interpreting s. 893.147, F.S., Florida courts have held that the “statute does not require that a person unequivocally know that the paraphernalia will be used for

⁴ Section 893.146, F.S.

⁵ Section 893.147(2), F.S.

⁶ Section 893.147(3), F.S.

⁷ *Id.*

⁸ The relevant portion of the definition of contraband is defined in s. 932.701(2)(a)1., F.S.

⁹ *Lawson v. State*, 666 So. 2d 193, 194 (Fla. 2d DCA 1995).

¹⁰ *Id.*; *K.A.K. v. State*, 885 So. 2d 405, 407 (Fla. 2d DCA 2004) (the court stated that in trying to prove constructive possession, a defendant's mere proximity to illicit items is insufficient to sustain a conviction).

an illicit purpose; rather, the state must only show that the defendant knew or reasonably should have known that the drug paraphernalia would be used for such purposes.”¹¹

Proving requisite intent is often difficult because some items have multiple, and often legal, uses or contain features that may suggest a use other than an illegal use or support a claim that the item is not being sold for an illegal use. In *Subuh v. State*, 732 So.2d 40, 44 (Fla. 2d DCA 1999), the court noted that a glass pipe sold by the defendant and which police claimed was a crack pipe was “very similar to the ‘glass tube’ or ‘pipette’ commonly found in any chemistry laboratory or glass ‘straw’ formerly used in hospitals for patients to drink liquids, except this one was shorter.” The court stated that “[a]lthough we are hard pressed to think of a probable lawful use for this tube when purchased from this location, there are many lawful uses for glass tubing.”

Controlled Substances

The Florida Comprehensive Drug Abuse Prevention and Control Act, codified in ch. 893, F.S., divides controlled substances into five categories ranging from Schedule I to Schedule V.¹² For example, a drug in Schedule I has a “high potential for abuse and has no currently accepted medical use in treatment in the United States,” while a drug in Schedule V has a “low potential for abuse relative to the substances in Schedule IV and has a currently accepted medical use in treatment in the United States.”¹³ The scheduling of a controlled substance is relevant to how it can be prescribed and to the severity of the criminal offense for its illicit possession, sale, or purchase.

Methamphetamine

Methamphetamine, often called meth, is a Schedule II¹⁴ controlled substance under both Florida law and federal law.¹⁵ Meth is a highly addictive drug that stimulates the central nervous system.¹⁶ Meth was extensively used following World War II to reduce fatigue and suppress appetite.¹⁷ The use of meth continued to expand and create substantial health threats, prompting the placement of meth into Schedule II of the Controlled Substance Act (CSA) in 1971, as well as the passage of the 1974 Drug Control Act, which limited the medicinal use of all amphetamines.¹⁸ There are numerous health hazards associated with methamphetamine including: increased wakefulness, decreased appetite, rapid heart rate, increased blood pressure, convulsions, cardiovascular collapse, and death.¹⁹

¹¹ *Baldwin v. State*, 498 So. 2d 1385, 1386 (Fla. 5th DCA 1986); *Subuh v. State*, 732 So. 2d 40, 43 (Fla. 2d DCA 1999).

¹² Section 893.03, F.S.

¹³ Sections 893.03(1) and (5), F.S.

¹⁴ A drug 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.” Section 893.03(2), F.S.

¹⁵ Section 893.02(2)(c)4., F.S., and 21 U.S.C. s. 812.

¹⁶ U.S. DRUG ENFORCEMENT AGENCY, METHAMPHETAMINE, <http://www.usdoj.gov/dea/concern/meth.html> (last visited April 19, 2007) (hereinafter DEA).

¹⁷ UCLA INTEGRATED SUBSTANCE ABUSE PROGRAMS, METHAMPHETAMINE, METH OVERVIEW, <http://www.methamphetamine.org/html/overview.html> (last visited April 19, 2007).

¹⁸ *Id.*; see also DEA, *supra* note 16.

¹⁹ NAT’L INST. ON DRUG ABUSE, NIDA INFOFACTS: METHAMPHETAMINE, <http://www.nida.nih.gov/infofacts/methamphetamine.html> (last visited April 19, 2007).

According to the 2005 National Survey on Drug Use and Health, approximately 10.4 million Americans, ages 12 and older, reported trying methamphetamine at least once during their lifetimes.²⁰ In 2006, methamphetamine use was reported by 1.8 percent of 8th- and 10th-graders, and 2.5 percent of 12th-graders.²¹

The federal government continues to pass legislation relating to methamphetamine in an attempt to curtail its use and clandestine production.²²

Salvinorin A

Salvinorin A, also called divinorin A, is believed to be the active component of *Salvia divinorum*.²³ Salvinorin A has been reported to be the most potent naturally occurring hallucinogen, rivaling the synthetic hallucinogens LSD or DOB²⁴ in potency.²⁵ Potential psychic effects of salvinorin A include perceptions of bright lights, vivid colors and shapes, body movements or distortions, dysphoria, a sense of loss of body, and overlapping realities and hallucinations.²⁶ Neither *Salvia divinorum* nor salvinorin A have been approved for medical use in the United States.²⁷ While *Salvia divinorum* and salvinorin A are not currently controlled under the Controlled Substance Act, a number of states have placed controls on them, such as making it illegal to purchase or distribute *Salvia divinorum* or placing *Salvia divinorum* and salvinorin A into Schedule I of the states' drug regulations.²⁸

III. Effect of Proposed Changes:

This bill amends s. 893.147, F.S., to provide that it is a second-degree felony to use, or possess with intent to use, drug paraphernalia to manufacture, compound, convert, produce, process, or prepare methamphetamine in violation of ch. 893, F.S., the "Florida Comprehensive Drug Abuse Prevention and Control Act." Accordingly, a person convicted under this section could face up to 15 years of imprisonment and up to \$10,000 in fines for a first-time offense.²⁹

²⁰ *Id.*

²¹ *Id.*

²² See DEA, *supra* note 16.

²³ *Salvia divinorum* is a perennial herb in the mint family, native to certain areas of the Sierra Mazteca region of Oaxaca, Mexico. It is used by the Mazotec Indians for ritual divination and healing. OFFICE OF DIVERSION CONTROL, U.S. DEP'T OF JUSTICE DRUG ENFORCEMENT ADMINISTRATION, DRUGS AND CHEMICALS OF CONCERN: SALVIA DIVINORUM AND SALVINORIN A (January 2007), http://www.deadiversion.usdoj.gov/drugs_concern/salvia_d/salvia_d.htm (last visited April 23, 2007) (hereinafter OFFICE OF DIVERSION CONTROL).

²⁴ DOB is a psychedelic hallucinogenic drug and is often misrepresented as LSD. Internationally, DOB is a Schedule I drug under the Convention on Psychotropic Substances. Wikipedia, at <http://en.wikipedia.org/wiki/2,5-Dimethoxy-4-bromoamphetamine> (last visited April 23, 2007).

²⁵ BRYAN L. ROTH ET AL., SALVINORIN A: A POTENT NATURALLY OCCURRING NONNITROGENOUS K OPIOID SELECTIVE AGONIST, 99 PROC. NAT'L ACAD. SCI. U.S.A. 18 (September 3, 2002), <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=129372> (last visited April 23, 2007).

²⁶ OFFICE OF DIVERSION CONTROL, *supra* note 23.

²⁷ *Id.*

²⁸ *Id.* In 2005, Louisiana made it illegal to purchase or distribute *Salvia divinorum*. Both Delaware and Missouri have added *Salvia divinorum* and salvinorin A into Schedule I of the states' drug regulations. Other states continue to introduce legislation regulating controls on salvinorin A and/or *Salvia divinorum*.

²⁹ Sections 775.082 and 775.083, F.S. The bill also authorizes punishment for a felony of the second degree as provided in s. 775.084, F.S., the violent career or habitual felony offenders section.

The bill also amends s. 921.0022, F.S., the Criminal Punishment Code offense severity ranking chart, to include the offense of use or possession of drug paraphernalia related to the production of methamphetamine as a level 7 offense.³⁰ As a level 7 offense, the lowest permissible sentence for an offender convicted of this crime, who has no prior criminal history, would be 21-months of imprisonment, absent any mitigation of sentence.³¹ However, the judge could sentence above the lowest permissible sentence score up to the maximum penalty for a second-degree felony.³²

Section 893.03, F.S., is amended to include salvinorin A on the list of controlled substances in Schedule I.

The bill provides that the act shall take effect on July 1, 2007.

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:

The Criminal Justice Impact Conference (conference), which provides the official estimate of the prison bed impact of legislation, had not estimated the impact of SB 1718

³⁰ The offense severity ranking chart ranks offenses from least severe, level 1, to most severe, level 10. Section 921.0022(2), F.S.

³¹ See s. 921.0024(2), F.S. This section provides that when the total sentence points exceeds 44 points (a level 7 offense accrues 56 points), the lowest permissible sentence is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.

³² The maximum penalty for a second-degree felony pursuant to ss. 775.082 and 775.083, F.S., is up to 15 years of imprisonment and/or a fine not to exceed \$10,000.

at the time this analysis was completed. However, the conference did estimate that HB 1155³³ could have a potentially large impact on prison beds.³⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

³³ House Bill 1155 is comparable to SB 1718.

³⁴ ECON. & DEMOGRAPHIC RESEARCH, FLA. LEGISLATURE, CRIMINAL JUSTICE ESTIMATING CONFERENCE, 2007 CONFERENCE RESULTS, <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm> (last visited April 19, 2007).

VIII. Summary of Amendments:

None.

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