

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 Judiciary Committee

BILL: CS/SB 390

INTRODUCER: Criminal Justice Committee, Senator Oelrich, and others

SUBJECT: Controlled Substances

DATE: April 15, 2008

REVISED: 04/16/08

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.	Treadwell	Maclure	JU	Favorable
3.			JA	
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:

The primary purpose of the bill appears to be to address the illegal growing of marijuana through indoor grow operations. The bill provides that:

- “Cultivating” means the preparation of any soil or hydroponic medium for the planting of a controlled substance or the tending and care or harvesting of a controlled substance.
- It is a third-degree felony to own, lease, or rent any place, structure, trailer, or conveyance with the knowledge that it will be used for the purpose of the manufacture of a controlled substance intended for sale or distribution to another.
- It is a second-degree felony to knowingly be in actual or constructive possession of any place, structure, or part thereof, trailer or any conveyance with the knowledge that the place, structure, or part thereof, trailer or conveyance will be used for the purpose of trafficking in a controlled substance, the sale of a controlled substance, or the manufacture of a controlled substance intended for sale or distribution to another.
- It is a first-degree felony to be in actual or constructive possession of a place, structure, trailer, or conveyance with the knowledge that the place, structure, trailer, or conveyance is being used to manufacture a controlled substance intended for sale or distribution to

- another if the person knew or should have known that a minor is present or resides in the place, structure, trailer, or conveyance.
- Proof of the possession of 25 or more cannabis plants constitutes prima facie evidence that the cannabis is intended for sale or distribution.
 - In the prosecution of an offense involving the manufacture of a controlled substance, a photograph or video recording of the manufacturing equipment used in committing the offense may be introduced as competent evidence of the existence and use of the equipment and is admissible in the prosecution of the offense to the same extent as if the property were introduced as evidence.
 - After a law enforcement agency documents the manufacturing equipment by photography or video recording, the agency may destroy the manufacturing equipment on site and leave it in disrepair.
 - The law enforcement agency destroying the equipment is immune from civil liability for the destruction of the equipment. The destruction of the equipment must be recorded by the supervising law enforcement officer and records must be maintained for 24 months.
 - The created offenses are ranked within the offense-severity ranking chart of the Criminal Punishment Code.

This bill substantially amends the following sections of the Florida Statutes: 465.016, 465.023, 893.02, 893.10, 893.135, 893.1351, and 921.0022, F.S.

II. Present Situation:

Indoor Grow Operations

With regard to the cultivation of marijuana in Florida, the Florida Department of Law Enforcement (FDLE) reported:

The indoor cultivation of domestic marijuana continues to be prevalent throughout the state. In 2006, the reported seizures of marijuana from Indoor Grow Operations outpaced the seizures from Outdoor Grow Operations. However, the reported number of plants seized this year was less than 2005.

Investigative intelligence indicates that marijuana cultivators continue to move indoors to avoid detection and to increase the quality of the marijuana being produced. The sterile and clemently controlled environments available to Indoor Grow Operations enable cultivators to utilize sophisticated techniques to increase Δ -9 Tetrahydrocannabinol (THC), the primary psychoactive ingredient of marijuana. Indoor Grow Operations also allow the cultivators to artificially induce as many as four growing seasons per year as opposed to one season limited by nature in Outdoor Grow Operations.¹

More recently, FDLE also reported that:

¹ Drug Enforcement Administration and the Florida Department of Law Enforcement, *2006 Annual Report - Indoor Grow Investigations*, 1 (March 2007), available at http://www.fdle.state.fl.us/publications/mjeradication/2006_marijuana_annual_report.pdf (last visited April 10, 2008).

. . . county and local law enforcement agencies in 45 of Florida's 67 counties reported the detection and dismantling of 944 Indoor Grow sites, resulting in the eradication of 74,698 marijuana plants. This represents twice the number of plants eradicated in 2006. Some of the reported Indoor Grow sites were small and simple, while others were more complex and highly organized. DEA eradicated 941 plants at one site in Marion County. Both the Miami-Dade Police Department and the Seminole County Sheriff's Office eradicated sites having over 850 plants.

* * * *

In addition, law enforcement reported the arrests of 971 cultivators. This is nearly double the number of arrests reported in 2006. Law enforcement also reported the seizure of 188 firearms in 2007. Both state and federal prosecutions of cultivators resulted pursuant to these arrests.²

Finally, FDLE reported that marijuana cultivators continue to relocate their operations indoors to enhance the quality of the marijuana produced, and to assist in eluding detection by law enforcement.³

Locations Used for Controlled Substance Trafficking

Current law provides that it is a third-degree felony for a person to lease or rent any place, structure, or part thereof, trailer, or other conveyance, with the knowledge that such place, structure, trailer, or conveyance will be used for the purpose of trafficking in a controlled substance or the sale of a controlled substance.⁴ Owners of these locations are not subject to criminal penalties.

Quantities of Controlled Substances

Generally, it is a third-degree felony to possess a controlled substance in a quantity less than the threshold required for trafficking.⁵ This is possession without intent to sell, manufacture, etc., a controlled substance (sometimes referred to as "simple possession"). However, possession of not more than 20 grams of cannabis is a first-degree misdemeanor, and possession in excess of 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b), F.S. (such as ecstasy or heroin), is a first-degree felony.⁶

² Drug Enforcement Administration and the Florida Department of Law Enforcement, *2007 Indoor Grow Report*, 2 (February 2008), available at http://www.fdle.state.fl.us/publications/mjeradication/domesticmarijuanaeradicationprogramannualreport_2007.pdf (last visited April 10, 2008).

³ *Id.*

⁴ Section 893.1351, F.S.

⁵ Section 893.13(6)(a), F.S. The trafficking statute, s. 893.135, F.S., is only applicable to certain controlled substances, as specified in that statute.

⁶ Section 893.13(6)(b) and (c), F.S. This provision also applies to combinations and mixtures.

Admissibility of Photographs and Video Recordings in Criminal Prosecutions

Generally, upon proper foundation, photographs are admissible in criminal prosecutions.⁷ Photographs meet the preliminary requirements for admissibility where it is established that they are relevant, in that they aid the court and jury in finding the truth, and they have been properly authenticated.⁸ A videotape, like a photograph, will be admissible, if relevant, and upon proper authentication.⁹

The Florida Evidence Code contains a statute which expressly deals with the admissibility of photographs in certain criminal prosecutions. Section 90.91, F.S., provides that in any prosecution for a crime involving the wrongful taking of property, a photograph of the property alleged to have been wrongfully taken may be deemed competent evidence of such property and may be admissible in the prosecution to the same extent as if such property were introduced as evidence.

The photograph must bear a written description of the property alleged to have been wrongfully taken, the name of the owner of the property, the location where the alleged wrongful taking occurred, the name of the investigating law enforcement officer, the date the photograph was taken, and the name of the photographer. The writing must be made under oath by the investigating law enforcement officer, and the photograph must be identified by the signature of the photographer. Upon the filing of the photograph and writing with the law enforcement authority or court holding the property as evidence, the property may be returned to the owner from whom the property was taken.

Destruction of Controlled Substances and Contraband by Law Enforcement

Under current law, a controlled substance that is possessed in violation of ch. 893, F.S., is contraband and is subject to seizure and confiscation.¹⁰ The court having jurisdiction must order the substance forfeited and destroyed.¹¹ A record must be kept of the place where the controlled substance was seized, the kind and quantity of the controlled substance destroyed, and the time, place, and manner of destruction and a return under oath reporting the destruction must be made to the court by the officer who destroys the controlled substance.¹²

The Florida Contraband Forfeiture Act (the act) provides for the forfeiture of property used to transport, conceal, or possess any contraband article.¹³ Under the act, “contraband article” is defined as:

Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange that was used, was attempted to be used, or was intended to be used in violation of any provision of

⁷ See *Kimbrough v. State*, 219 So. 2d 122 (Fla. 1st DCA 1969).

⁸ See *Furr v. State*, 229 So. 2d 269 (Fla. 2d DCA 1969).

⁹ See *Bryant v. State*, 810 So. 2d 532 (Fla. 1st DCA 2002).

¹⁰ Section 893.12, F.S.

¹¹ Section 893.12(1)(a), F.S.

¹² Section 893.12(1)(d), F.S.

¹³ Section 932.703(1)(a), F.S. See also 14A FLA. JUR 2D Criminal Law § 852, *Florida Contraband Forfeiture Act* (2008).

chapter 893, if the totality of the facts presented by the state is clearly sufficient to meet the state's burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband article can be traced to a specific narcotics transaction.¹⁴

According to the act, personal property may be seized at the time the offense occurred or after the violation, provided that the person entitled to notice is advised that he or she has a right to an adversarial preliminary hearing to determine whether probable cause exists to believe that the property is in violation of the act.¹⁵ Upon seizure, all rights to, interest in, and title to contraband articles shall vest in the seizing law enforcement agency.¹⁶

Immunity for Law Enforcement Officers

State and local government enjoys sovereign immunity for actions law enforcement personnel take or omit in performing discretionary activities inherent in the act of governing.¹⁷ Activities for which law enforcement and public safety regulatory officials enjoy immunity are those activities involving "basic discretionary judgment in the enforcement of police power, public safety functions by a state, county, or municipal governmental entity."¹⁸

III. Effect of Proposed Changes:

The primary purpose of the bill appears to be to address the illegal growing of marijuana through indoor grow operations. Following is a section-by-section analysis of the bill:

Definitions

Section 1 of the bill amends s. 893.02, F.S., the definitions section of ch. 893, F.S. (controlled substances), to define "cultivating" as "the preparation of any soil or hydroponic medium for the planting of a controlled substance or the tending and care or harvesting of a controlled substance."

Locations Used for Controlled-Substance Trafficking or Manufacturing

Section 2 of the bill amends s. 893.1351, F.S., to provide that it is a third-degree felony to *own*, as well as lease or rent, any place, structure, trailer, or conveyance with the knowledge that it will be used for the purpose of trafficking or the manufacturing of a controlled substance intended for sale or distribution to another.

The bill also provides that it is a second-degree felony to knowingly be in actual or constructive possession of any place, structure, or part thereof, trailer or any conveyance with the knowledge that the place, structure, or part thereof, trailer or conveyance will be used for the purpose of

¹⁴ Section 932.701(2)(a)1., F.S.

¹⁵ Section 932.703(2)(a), F.S.

¹⁶ Section 932.703(1)(c), F.S.

¹⁷ *White v. City of Waldo*, 659 So. 2d 707, 712 (Fla. 1st DCA 1995).

¹⁸ *Mosby v. Harrell*, 909 So. 2d 323, 328 (Fla. 1st DCA 2005) (citing *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 923 (Fla. 1985)).

trafficking in a controlled substance, the sale of a controlled substance, or the manufacture of a controlled substance intended for sale or distribution to another.

Under the bill, it is a first-degree felony to be in actual or constructive possession of a place, structure, trailer, or conveyance with the knowledge that the place, structure, trailer or conveyance is being used to manufacture a controlled substance intended for sale or distribution to another if the person knew or should have known that a minor is present or resides in the place, structure, trailer, or conveyance.

The bill provides that proof of the possession of 25 or more cannabis plants constitutes prima facie evidence that the cannabis is intended for sale or distribution. This provision will aid in the prosecution of the offenses delineated in this section.

Admissibility of Photographs of Controlled Substance Manufacturing Equipment

Section 3 of the bill amends s. 893.10, F.S., to provide that in the prosecution of an offense involving the manufacture of a controlled substance, a photograph or video recording of the manufacturing equipment used in committing the offense, including, but not limited to, grow lights, growing trays, and chemical fertilizers, may be introduced as competent evidence of the existence and use of the equipment and is admissible in the prosecution of the offense to the same extent as if the property were introduced as evidence.

The bill does not include any provision for the requisite authentication of the photograph or videotape. Although a similar statute currently in the Evidence Code regarding stolen property, s. 90.91, F.S., creates a similar exception for the admissibility of photographs in the criminal prosecution context, that statute includes authentication safeguards. These safeguards include a writing under oath which provides a description of the property, the name of the owner of the property, the location where the alleged wrongful taking occurred, the name of the investigating officer, the date of the photograph, as well as the name of the photographer. Additionally, the photograph must be identified by the signature of the photographer. Because the manufacturing equipment is not the primary evidence for prosecution of trafficking and manufacturing controlled substances, and because the Evidence Code would likely govern the authentication and admissibility of the photographs and video recordings,¹⁹ including the explicit authentication measures utilized in s. 90.91, F.S., may not be necessary.

Destruction of Controlled Substance Manufacturing Equipment

The bill also provides that after a law enforcement agency documents the manufacturing equipment by photography or video recording, the manufacturing equipment may be destroyed on site and left in disrepair. The law enforcement agency destroying the equipment is immune from civil liability for the destruction of the equipment. The destruction of the equipment must

¹⁹ Section 90.901, F.S., provides that: “[a]uthentication or identification of evidence is required as a condition precedent to its admissibility. . . .” Furthermore, “[e]xcept as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph.” Section 90.952, F.S.

be recorded in the manner described in s. 893.12(1)(a), F.S.,²⁰ and records must be maintained for 24 months after destruction of the equipment.

Although it appears that the seizure of controlled substance contraband would fall within the ambit of the Contraband and Forfeiture Act, the bill authorizes immediate destruction of the equipment, without providing notice, and the opportunity for an adversarial hearing, to the owner or user of the manufacturing equipment.²¹

Offense Severity Ranking Chart

Section 4 amends s. 921.0022, F.S., the offense severity ranking chart of the Criminal Punishment Code, to rank the new third-degree felony in Level 5, the new second-degree felony in Level 7, and the new first-degree felony in Level 8.

Technical Changes

Sections 5, 6, and 7 amend, respectively, ss. 465.016, 465.023, and 893.135, F.S., to conform statutory references applicable to s. 893.02, F.S.

Effective Date

Section 8 provides that the bill takes effect on July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues

Separation of Powers

The “best evidence rule” requires that the best obtainable evidence should be adduced to prove every disputed fact, and a failure to produce it authorizes the inference that the

²⁰ Section 893.12(1)(a), F.S., provides: “A record of the place where said controlled substances or listed chemicals were seized, of the kinds and quantities of controlled substances or listed chemicals destroyed, and of the time, place, and manner of destruction shall be kept, and a return under oath reporting said destruction shall be made to the court by the officer who destroys them.”

²¹ See s. IV, D., *Other Constitutional Issues*.

party does not furnish the best evidence because it would tend to defeat, instead of sustaining, the issue on his part.²² In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had.²³ The new provision allowing introduction of photographs or video recordings of manufacturing equipment appears to be a modified version of an existing exception to this rule.

Any statute that modifies the rules of evidence must be considered in light of the separation of powers doctrine.²⁴ There is a balance that exists in evidentiary matters, where the legislature may elect to create or modify substantive rights, while the court retains the constitutional exclusive right to determine procedural matters before the courts.²⁵ For rules of evidence, the constitutionality of the rule depends on whether the provisions are substantive or procedural.²⁶

Due Process

The 14th Amendment of the U.S. Constitution and article I, section 9 of the Florida Constitution protect a person's right to due process of law. Due process requires that those asserting an interest in property be afforded with notice and an opportunity to be heard at all stages of a forfeiture proceeding under the Contraband Forfeiture Act.²⁷ Procedural due process under the Florida constitution:

guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights. It contemplates that the defendant shall be given fair notice [] and afforded a real opportunity to be heard and defend [] in an orderly procedure, before judgment is rendered against him.²⁸

²² *Liddon v. Board of Pub. Instruction*, 175 So. 806 (Fla. 1937).

²³ *Id.* at 808.

²⁴ *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). "Article II, section 3 of the Florida Constitution prohibits the members of one branch of government from exercising 'any powers appertaining to either of the other branches unless expressly provided herein.' Article V, section 2(a) states that the Florida Supreme Court has the exclusive authority to 'adopt rules for the practice and procedure in all courts, including the time for seeking appellate review.' The Legislature has the authority to repeal judicial rules by a two-thirds vote, but the authority to initiate rules rests with the Court."

²⁵ Jeffery I. Jacobs, *Annual Report, Committees of the Florida Bar*, 78 Fla. B.J. 40, 47 (June 2004). "Since the code's creation in the 1970s, Florida has adopted a statutory scheme in which changes are advanced through legislation, and then considered by the Florida Supreme Court biennially for adoption as rules of procedure."

²⁶ *Id.* "Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law." See also *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972). "Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term 'procedure,' I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term 'rules of practice and procedure' includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution."

²⁷ *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 961 (Fla. 1991).

²⁸ *Id.* at 960 (citing *State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (1936)).

The state is allowed to seize personal property prior to notice or a hearing provided that notice and the opportunity for an adversarial preliminary hearing are made available as soon as possible after the seizure.²⁹

The Contraband Forfeiture Act (the act) satisfies the requirements of procedural due process, because the state is required to proceed against a contraband article by filing a complaint, giving notice to interested persons, and showing by clear and convincing evidence that the contraband article was being used in violation of the act.³⁰

The state has an interest in “restraining the use of potentially forfeitable property to punish criminal wrongdoers; to seek retribution for society; to deter continued use of the property for criminal activity; to remedy the wrongs done to society; and to compensate the state for its law enforcement services.”³¹ However, the means adopted by the state to protect its interests “must be narrowly tailored to achieve its objective through the least restrictive alternative where . . . basic rights are at stake.”³²

The absence of notice and an opportunity for an adversarial hearing prior to destruction of the manufacturing equipment, as written in the bill and unlike the procedural safeguards provided in the act, may raise questions whether this provision can reasonably be construed to comport with minimal due process requirements. While law enforcement has a verifiable interest in deterring continued use of the property for criminal activity, the constitutionality of this provision may turn on a court’s decision whether the provision is narrowly tailored to achieve this objective.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent the bill, if enacted, reduces the number of marijuana growhouse operations, the bill could benefit utility companies adversely impacted by unpaid bills for power usage by the growhouse operations, homeowners who may incur the cost of clean-up, and neighborhoods in which property values are adversely affected by grow houses.

C. Government Sector Impact:

The Criminal Justice Impact Conference determined that an earlier version of this legislation could have a potentially significant impact on prison beds. After the

²⁹ *Id.* at 965.

³⁰ *State v. Sobieck*, 701 So. 2d 96, 101 (Fla. 5th DCA 1997).

³¹ *Department of Law Enforcement*, 588 So. 2d at 964.

³² *Id.* (citing Art. I, s. 9, Fla. Const.).

legislation was amended, however, the conference subsequently determined that it would have an insignificant prison bed impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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, 2008:

- Defines the term “cultivating.”
- Removes a penalty provision relating to possession of any amount of a controlled substance in close proximity to an infant or toddler.
- Increases from a third-degree felony to a second-degree felony the new offense of knowingly being in actual or constructive possession of any place, structure, or part thereof, trailer or any conveyance with the knowledge that the place, structure, or part thereof, trailer or conveyance will be used for the purpose of trafficking in a controlled substance, the sale of a controlled substance, or the manufacture of a controlled substance intended for sale or distribution to another.
- Provides that the records of the destruction of equipment used in the manufacture of a controlled substance must be maintained for 24 months.
- Deletes directory language ranking newly created offenses and ranks those offenses in the offense severity ranking chart of the Criminal Punishment Code.

B. Amendments:

None.