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# **Criminal Justice Subcommittee**

**January 16, 2013**

**8:30 AM**

**404 HOB**

**Will W. Weatherford**  
Speaker

**Matt Gaetz**  
Chair

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Criminal Justice Subcommittee

**Start Date and Time:** Wednesday, January 16, 2013 08:30 am  
**End Date and Time:** Wednesday, January 16, 2013 11:00 am  
**Location:** 404 HOB  
**Duration:** 2.50 hrs

**Consideration of the following proposed committee bill(s):**

PCB CRJS 13-01 -- Massage Establishments

Presentation by the Florida Department of Law Enforcement on synthetic drugs.


Presentation by the Office of Attorney General on the scheduling of controlled substances by emergency rule.

Presentation by the Office of Attorney General on human trafficking.


Discussion on the Criminal Justice Subcommittee's Workplan.

**NOTICE FINALIZED on 01/09/2013 16:10 by hudson.jessica**



  
**Synthetic Narcotics**  

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**Presented by the  
Florida Department of Law Enforcement**  
  
**Special Agent Supervisor David Gross**  
January 16, 2013

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- Synthetic Drugs are nothing new to the United States (U.S.) and Florida.
- Recent history starting in the 1960-1970's showed a surge in synthetic drug use, such as Lysergic acid diethylamide (LSD).
- In the 1990s, designer drugs such as Gamma Hydroxybutyric Acid (GHB), ketamine, and Methylenedioxymethamphetamine (MDMA) were available and abused in Florida, but to a lesser extent than more mainstream controlled substances, such as cocaine and heroin.

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- Obscure synthetic narcotics, some sold as early as 2004; were originally seen in Europe before arriving in the U.S. around 2007
- Used as a "legal" substitute for effects similar to cocaine, MDMA, and methamphetamine
- Drugs are in a white or light brown powder form, and have not been tested on humans, with unknown health outcomes from their use
- Drugs may be snorted, smoked, or swallowed; short duration and intense high leads to possible compulsive re-dosing



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- Based on their chemical make-up, synthetic drugs are typically divided into three categories: *cannabinoids* (popularly known as *K2* or *Spice*), *cathinones* (often known as *bath salts*) and *synthetic phenethylamines*
- Synthetic drugs are industrial grade chemicals mixed so as to produce in consumers "highs" similar to what might be experienced using illegal drugs such as marijuana, cocaine and methamphetamine.
- Some purveyors of these mixtures have marketed their use as a way to experience "legal" – and therefore somehow "safe" - highs.

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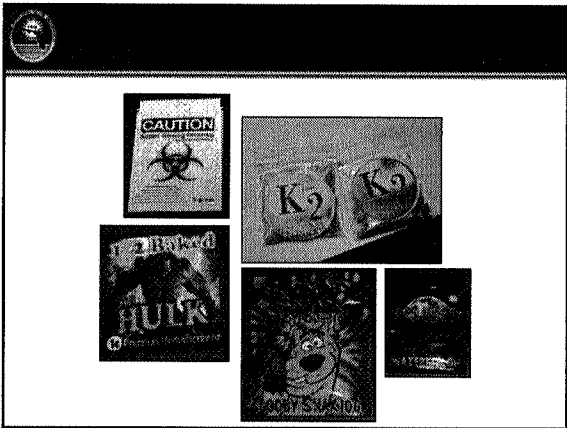
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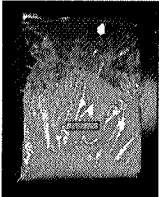
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### Synthetic Cannabinoids

- JWH-series Created by Dr. John W. Huffman at Clemson University in 1995
- Purpose was to study brain receptors and physiological responses without using delta-tetrahydrocannabinol (THC)
- Public academic studies became available online, which lead to its recent increased use since the substances are easily replicated with household chemicals
- Chemicals are a white powder, often applied to plant material to mimic marijuana use




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**Synthetic Cannabinoids**

- The human body recognizes the JWH-chemicals as foreign and creates an unpleasant physiological rejection
  - Symptoms include paranoia, increased cardiovascular activity, hallucinations, convulsions, and unconsciousness
  - Experience does not mimic marijuana for most users
- Common brands: K2, Spice, Genie
- Average price is \$35 for a 3 gram bag
  - Simple possession of <3 grams is misdemeanor in "non-powder" form

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**Synthetic Cannabinoids**

- Dec 2009 – Sarasota, FL: two teenagers taken to the emergency room after smoking Spice; both were released after being treated for convulsions
- Jun 2010 – Wakulla County, FL: two teenagers taken to the emergency room after smoking Spice; law enforcement responded to the scene first and found one of the teenagers unresponsive
- Mar 2011 – Leon County, FL- Triple vehicular fatality where synthetic cannabinoids were implicated as a causation factor

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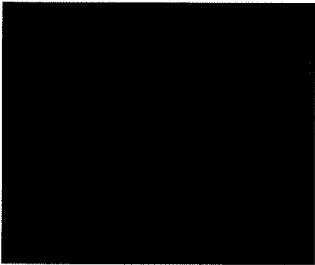
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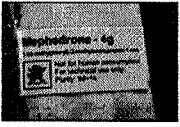
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- Cathinones aka "Bath Salts" gained popularity in late 2010 to early 2011 due to their wide availability online and in smoke shops, in addition to the chemicals not being detected in drug tests
- Average price approximately \$30 per 500mg package
- Common brands: Ivory Wave, Vanilla Sky, Whack, & Purple Rain
- Common side effects: Increased heart rate; Delusions & Hallucinations; Spike in body temperature; Organ failure; & Seizures




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- April 4, 2011: Tampa, FL – Jairious McGhee, 23 years old, first person to die from direct use of Mephylone
  - Very agitated
  - Aggressive towards Law Enforcement
  - Admitted with 106°F temperature
- May 3, 2011: Charleston, WV – Mark Thompson, 19 years old, arrested under the influence of bath salts; found wearing women's underwear while stabbing a goat.


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**Synthetic Phenethylamines**  
**2C Class of Drugs**




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- Synthetic substance, 2,5-dimethoxy-4-ethylphenethylamine, invented in the 1970s by Dr. Alexander Shulgin (infamous for inventing ecstasy)
- 2C-E part of the "magical half-dozen" in his published book PiHKAL: Phenethylamines I Have Known And Loved
- Psychedelic substance known for its intense hallucinogenic experience

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- Recent increase in use of synthetic phenethylamines.
- With increase in law enforcement and legislative involvement of cannabinoids and cathinones, the production of these hallucinogenic compounds have increased.
- Highly dose sensitive and directly effect the body's central nervous system.

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- On November 3, 2012, a 21-year-old man accepted a single drop dosage of 25-I from a stranger at a festival in New Orleans. He was transported to Tulane University Hospital and placed on life support. The victim died three days later. 
- In June 2012, two incidents occurred in which teenagers died from overdoses of 2C-I in East Grand Forks, Minnesota and Grand Forks, North Dakota.
  - In East Grand Forks, the teenagers mixed 2C-I powder with melted chocolate.
  - Authorities believe the source of supply to be overseas.

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- On December 11, 2012 Attorney General Bondi signed Emergency Rule 2ER adding 22 new substances to Schedule I, Subsection 893.03(1)c, F.S. due to the potential for and significance of abuse and risk to the state of Florida.
- Law enforcement agencies were briefed relating to the Emergency Scheduling and voluntarily conducted visits to retail suppliers to educate the store personnel on the now scheduled hallucinogenic substances.
- Retailers could voluntarily seek destruction of the substances and those products were transferred to the local law enforcement agency.

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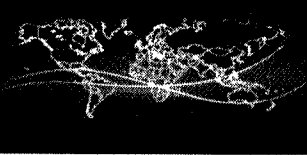
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- Monitor trends both domestically and internationally
  - New substances often seen in Europe initially, then military bases internationally / nationally prior to use by the general public
- Public/Government relationships



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**Special Agent Supervisor David Gross**  
**Florida Department of Law Enforcement**  
**davidgross@fdle.state.fl.us**  
**850-410-8389**

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CERTIFICATION OF  
DEPARTMENT OF LEGAL AFFAIRS EMERGENCY RULE  
FILED WITH THE DEPARTMENT OF STATE

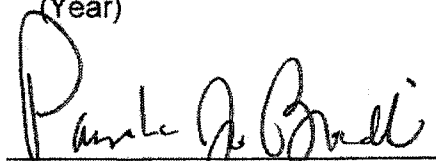
I hereby certify that an immediate danger to the public health, safety or welfare requires emergency action and that the attached rule is necessitated by the immediate danger. I further certify that the procedures used in the promulgation of this emergency rule were fair under the circumstances and that the rule otherwise complies with subsection 120.54(4), Florida Statutes. The adoption of this rule was authorized by the head of the agency and this rule is hereby adopted upon its filing with the Department of State.

Rule No.

2ER12-1

Under the provision of subparagraph 120.54(4)(d), F.S., this rule takes effect upon filing unless a later time and date less than 20 days from filing is set out below:

Effective: \_\_\_\_\_  
(Month) (Day) (Year)

  
\_\_\_\_\_  
Signature, Person Authorized  
To Certify Rules

\_\_\_\_\_  
Attorney General  
Title

3  
Number of Pages Certified

FILED  
2012 DEC 11 10:35  
DEPARTMENT OF STATE  
TALLAHASSEE, FLORIDA

NOTICE OF EMERGENCY RULE

DEPARTMENT OF LEGAL AFFAIRS

RULE TITLE:

RULE NO.:

Addition of

Pentedrone (2-(methylamino)-1-phenyl-1-pentanone)

Fluoroamphetamine

Fluoromethamphetamine

Methoxetamine

Methiopropamine

4-Methylbuphedrone (2-Methylamino-1-(4-methylphenyl)butan-1-one)

APB ((2-aminopropyl)benzofuran)

APDB ((2-aminopropyl)-2,3-dihydrobenzofuran)

UR-144 ((1-pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone)

XLR11 ((1-(5-fluoropentyl)-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone)

(1-(5-chloropentyl)-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone

AKB48 (1-pentyl-N-tricyclo[3.3.1.1<sup>3,7</sup>]dec-1-yl-1H-indazole-3-carboxamide)

AM-2233 ((2-iodophenyl)[1-[(1-methyl-2-piperidinyl)methyl]-1H-indol-3-yl]-methanone)

STS-135 (1-(5-fluoropentyl)-N-tricyclo[3.3.1.1<sup>3,7</sup>]dec-1-yl-1H-indole-3-carboxamide)

URB-597 ((3'-(aminocarbonyl)[1,1'-biphenyl]-3-yl)-cyclohexylcarbamate)

URB-602 ([1,1'-biphenyl]-3-yl-carbamic acid, cyclohexyl ester)

URB-754 (6-methyl-2-[(4-methylphenyl)amino]-1-benzoxazin-4-one)

2C-D (2-(2,5-Dimethoxy-4-methylphenyl)ethanamine)

2C-H (2-(2,5-Dimethoxyphenyl)ethanamine)

2C-N (2-(2,5-Dimethoxy-4-nitrophenyl)ethanamine)

2C-P (2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine)

25I-NBOMe(4-iodo-2,5-dimethoxy-N-[(2-methoxyphenyl)methyl]-benzeneethanamine)

to Schedule I, Subsection 893.03(1)(c), F.S.

2ER12-1

SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:

In written findings published on the date this emergency rule was filed with the Secretary of State's Office, Attorney General Bondi has found that there is a need to immediately place the above-mentioned psychoactive substances classifiable as Synthetic Cannabinoids, Cathinones, and Synthetic Phenethylamines under Schedule I, Subsection 893.03(1)(c), F.S., in order to curtail their abuse by Florida's children, young adults, and others. These substances are ostensibly legal and often perceived as a safer alternative to illegal drugs such as marijuana, MDMA ("ecstasy"), cocaine, and amphetamines. In many cases, however, they are more dangerous. Due to their chemical design, they are commonly available for purchase in specialty smoke shops, over the internet, in convenience stores and from other retailers, making them easily obtainable. These circumstances present an immediate and imminent hazard to the public health, safety, and welfare which requires emergency action. In addition the Attorney General has found that the above-mentioned compounds meet the statutory criteria for placement as a controlled substance in Schedule I, Subsection 893.03(1)(c), F.S.

REASONS FOR CONCLUDING THAT THE PROCEDURE USED IS FAIR UNDER THE CIRCUMSTANCES:

SUMMARY OF THE RULE:

The above-mentioned Synthetic Cannabinoids, Cathinones, and Synthetic Phenethylamines present an immediate and imminent hazard to the public health, safety, and welfare which requires emergency action. The Attorney General will ask the Florida Legislature to memorialize this action through legislation in its 2013 legislative session. The Attorney General will immediately begin rulemaking procedures if the Legislature fails to act. A copy of the Attorney General's findings in support of this emergency rule may be obtained by contacting the Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; (850) 245-0145.

SUMMARY OF THE RULE: Under the authority of Section 893.05, Florida Statutes, additional substances are being added to Schedule I, Subsection 893.03(1)(c), F.S.

THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS: Emery Gainey, Director, Law Enforcement Relations, Victim Services & Criminal Justice Programs, Department of Legal Affairs, PL-01, The Capitol, Tallahassee, Florida 32399-1050

THE FULL TEXT OF THE EMERGENCY RULE IS:

2ER12-1 Addition of

Pentdrone (2-(methylamino)-1-phenyl-1-pentanone)

Fluoroamphetamine

Fluoromethamphetamine

Methoxetamine

Methiopropamine

4-Methylbuphedrone (2-Methylamino-1-(4-methylphenyl)butan-1-one)

APB ((2-aminopropyl)benzofuran)

APDB ((2-aminopropyl)-2,3-dihydrobenzofuran)

UR-144 ((1-pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone)

XLR11 ((1-(5-fluoropentyl)-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone)

(1-(5-chloropentyl)-1H-indol-3-yl) (2,2,3,3-tetramethylcyclopropyl)methanone

AKB48 (1-pentyl-N-tricyclo[3.3.1.1<sup>3,7</sup>]dec-1-yl-1H-indazole-3-carboxamide)

AM-2233 ((2-iodophenyl)[1-[(1-methyl-2-piperidinyl)methyl]-1H-indol-3-yl]-methanone)

S1S-135 (1-(5-fluoropentyl)-N-tricyclo[3.3.1.1<sup>3,7</sup>]dec-1-yl-1H-indole-3-carboxamide)

URB-597 ((3'-(aminocarbonyl)[1,1'-biphenyl]-3-yl)-cyclohexylcarbamate)

URB-602 ([1,1'-biphenyl]-3-yl-carbamic acid, cyclohexyl ester)

URB-754 (6-methyl-2-[(4-methylphenyl)amino]-1-benzoxazin-4-one)

2C-D (2-(2,5-Dimethoxy-4-methylphenyl)ethanamine)

2C-H (2-(2,5-Dimethoxyphenyl)ethanamine)

2C-N (2-(2,5-Dimethoxy-4-nitrophenyl)ethanamine)

2C-P (2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine)

25I-NBOMe(4-iodo-2,5-dimethoxy-N-[(2-methoxyphenyl)methyl]-benzeneethanamine)

to Schedule I, Subsection 893.03(1)(c), F.S.

(1) Under the authority of Section 893.035, F.S., the following substances are hereby controlled substances, added to Schedule I, subsection 893.03(1)(c), F.S.:

- (a) Pentedrone (2-(methylamino)-1-phenyl-1-pentanone)
- (b) Fluoroamphetamine
- (c) Fluoromethamphetamine
- (d) Methoxetamine
- (e) Methiopropamine
- (f) 4-Methylbuphedrone (2-Methylamino-1-(4-methylphenyl)butan-1-one )
- (g) APB ((2-aminopropyl)benzofuran)
- (h) APDB ((2-aminopropyl)-2,3-dihydrobenzofuran)
- (i) UR-144 ((1-pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone)
- (j) XLR11 ((1-(5-fluoropentyl)-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone)
- (k) (1-(5-chloropentyl)-1H-indol-3-yl) (2,2,3,3-tetramethylcyclopropyl)methanone
- (l) AKB48 (1-pentyl-N-tricyclo[3.3.1.1<sup>3,7</sup>]dec-1-yl-1H-indazole-3-carboxamide)
- (m) AM-2233 ((2-iodophenyl)[1-(1-methyl-2-piperidinyl)methyl]-1H-indol-3-yl)methanone)
- (n) STS-135 (1-(5-fluoropentyl)-N-tricyclo[3.3.1.1<sup>3,7</sup>]dec-1-yl-1H-indole-3-carboxamide)
- (o) URB-597 ((3'-(aminocarbonyl)[1,1'-biphenyl]-3-yl)-cyclohexylcarbamate)
- (p) URB-602 ([1,1'-biphenyl]-3-yl-carbamic acid, cyclohexyl ester)
- (q) URB-754 (6-methyl-2-[(4-methylphenyl)amino]-1-benzoxazin-4-one)
- (r) 2C-D (2-(2,5-Dimethoxy-4-methylphenyl)ethanamine)
- (s) 2C-H (2-(2,5-Dimethoxyphenyl)ethanamine)
- (t) 2C-N (2-(2,5-Dimethoxy-4-nitrophenyl)ethanamine)
- (u) 2C-P (2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine)
- (v) 25I-NBOMe(4-iodo-2,5-dimethoxy-N-[(2-methoxyphenyl)methyl]-benzeneethanamine)

(2) All provisions of Chapter 893, F.S., applicable to controlled substances listed in Schedule I shall be applicable to the substances listed in subsections (1)(a) through (v), above.

Rulemaking Authority: 893.035 F.S.

Law Implemented: 893.035 F.S.

History - New

THIS RULE TAKES EFFECT IMMEDIATELY UPON BEING FILED WITH THE DEPARTMENT OF STATE  
UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.

# Regulating Designer Drugs

## ISSUE DESCRIPTION

During the 2011 Legislative Session, House Bill 39 and 1039 passed, adding specific chemical compounds of synthetic cannabinoids (K2/Spice) and synthetic cathinones (bath salts) to Schedule I of Florida's controlled substance schedules. Subsequently, new chemical compounds of synthetic cannabinoids and bath salts were developed that were not covered under existing law. As a result, those selling and possessing such substances could not be charged with a crime. In an attempt to address this problem, House Bill 1175 was passed in 2012, which amended s. 893.03, F.S., to add numerous additional synthetic cannabinoid and bath salt compounds to Schedule I.

It is anticipated that new compounds of synthetic cannabinoids and bath salts that are not included in the current drug schedules will be developed. However, it is unclear how to best regulate these not-yet-developed compounds (e.g., should Florida continue to file annual legislation listing newly developed chemical compounds in the drug schedules, can Florida enact a "catch-all" statute that would include any compound developed in the future in the drug schedules, etc.).

## BACKGROUND – CONTROLLED SUBSTANCES

### Florida's Drug Schedules

Florida's drug control laws are contained in ch. 893, F.S., entitled the Florida Comprehensive Drug Abuse Prevention and Control Act (Drug Control Act). The Drug Control Act classifies substances into the following five categories, ranging from Schedule I to Schedule V:

- Schedule I substances have a high potential for abuse<sup>1</sup> and have no currently accepted medical use in treatment in the United States and in its use under medical supervision does not meet accepted safety standards. Substances listed in Schedule I include cannabis and heroin.<sup>2</sup>
- Schedule II substances have a high potential for abuse and have an accepted but severely restricted medical use in treatment in the United States. Abuse of these substances may lead to severe psychological or physical dependence. Substances listed in Schedule II include oxycodone and cocaine.<sup>3</sup>
- Schedule III substances have a potential for abuse less than the substances contained in Schedules I and II and have an accepted medical use in treatment in the United States. Abuse of these substances may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. Substances in Schedule III include lysergic acid and anabolic steroids.<sup>4</sup>

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<sup>1</sup> Section 893.02(20), F.S., provides that "potential for abuse" means that a substance has properties of a central nervous system stimulant or depressant or an hallucinogen that create a substantial likelihood of its being:

- Used in amounts that create a hazard to the user's health or the safety of the community;
- Diverted from legal channels and distributed through illegal channels; or
- Taken on the user's own initiative rather than on the basis of professional medical advice.

Proof of potential for abuse can be based upon a showing that these activities are already taking place, or upon a showing that the nature and properties of the substance make it reasonable to assume that there is a substantial likelihood that such activities will take place, in other than isolated or occasional instances.

<sup>2</sup> Section 893.03(1), F.S.

<sup>3</sup> Section 893.03(2), F.S.

<sup>4</sup> Section 893.03(3), F.S.



- Schedule IV substances have a low potential for abuse relative to the substances in Schedule III and has an accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to the substances in Schedule III. Schedule IV substances include cathine and phentermine.<sup>5</sup>
- Schedule V substances have a low potential for abuse relative to the substances in Schedule IV and have an accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to the substances in Schedule IV. Schedule V substances include certain stimulant and narcotic drugs.<sup>6</sup>

All of the substances listed in Schedules I-V are “controlled substances” for purposes of the Drug Control Act.<sup>7</sup>

### **Criminal Penalties**

Chapter 893, F.S., contains a variety of provisions criminalizing behavior related to controlled substances. Most of these provisions are found in s. 893.13, F.S., which criminalizes the possession, sale, purchase, manufacture, and delivery of controlled substances. The penalty for violating these provisions depends largely on what schedule the substance is listed in. For example, it is a second degree felony for a person to purchase, or possess with intent to purchase, certain substances listed in Schedules I and II, but only a first degree misdemeanor if the substance is listed in Schedule V.<sup>8</sup> Other factors, such as the quantity of controlled substance involved, can also affect the penalties for violating the criminal provisions of ch. 893, F.S.<sup>9</sup>

### **DESIGNER DRUGS**

New substances are being created which are not controlled under the provisions of ch. 893, F.S., but which have a potential for abuse similar to or greater than controlled substances.<sup>10</sup> These substances, called designer drugs, are usually created by modifying an existing drug’s chemical structure so that it becomes a derivative or analog of the existing drug—one that is not contained in any of the drug schedules in s. 893.03, F.S.

Designer drugs are designed to produce a desired pharmacological effect and are used as substitutes for controlled substances in an effort to evade the criminal penalties in ch. 893, F.S.<sup>11</sup> The hazards attributable to the use of designer drugs are increased because their unregulated manufacture can produce variations in purity and concentration.<sup>12</sup> According to the Florida Alcohol & Drug Abuse Association, the number of designer drugs that can be made and distributed is unlimited.<sup>13</sup>

<sup>5</sup> Section 893.03(4), F.S.

<sup>6</sup> Section 893.03(5), F.S.

<sup>7</sup> Section 893.02(4), F.S.

<sup>8</sup> Section 893.13(2)(a), F.S.

<sup>9</sup> See, e.g., s. 893.13(6)(a) and (b), F.S., which make it a third degree felony for a person to be in actual or constructive possession of a controlled substance (unless otherwise authorized by ch. 893, F.S.), but only a first degree misdemeanor if the possession involved no more than 20 grams of cannabis.

<sup>10</sup> Section 893.035(1), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Also see, *Synthetic Substance Ban*. Unit Reporting: Office of Statewide Intelligence. Florida Fusion Center. Brief # 12-150 Public, March 23, 2012. (On file with House Criminal Justice Subcommittee).

<sup>13</sup> *Designer Drugs: An Educational Fact Sheet*. The Florida Alcohol & Drug Abuse Association. (On file with House Criminal Justice Subcommittee).

Since the early 1980s, there has been national-level attention on the use and abuse of designer drugs. Two newly-developed designer drugs which have emerged across the nation are synthetic cannabinoids,<sup>14</sup> also known as “K2/Spice,” and substituted cathinones,<sup>15</sup> commonly referred to as bath salts.<sup>16</sup> Synthetic cannabinoids and bath salts are often sold in retail outlets as “herbal incense” and “plant food,” respectively, and labeled “not for human consumption” to mask their intended purpose.<sup>17</sup> Like many other designer drugs, these drugs are used predominately by the youth population.<sup>18</sup>

Documented side effects from synthetic cannabinoids and bath salts include: tachycardia, hypertension, anxiety, high blood pressure, and hallucinations.<sup>19</sup> Other effects include altered and unpredictable behavior patterns—some of which have affected public safety. According to data from the American Association of Poison Control Centers (AAPCC), there were 6,959 calls related to adverse effects associated with just synthetic cannabinoid substances in 2011, nearly 2.4 times the amount of calls in 2010.<sup>20</sup> As of April 2012, the AAPCC reported 7,449 calls related to effects associated with bath salts from since 2010.<sup>21</sup> According to the Florida/USVI Poison Information Center Network (USVI), there were 1244 synthetic cannabinoid exposures and 252 bath salt exposures reported to the USVI from 2010 through September 2012.<sup>22</sup>

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<sup>14</sup> “Synthetic cannabinoids” are chemically engineered substances, similar to tetrahydrocannabinol (THC)—the active ingredient in marijuana—that, when smoked or ingested, can produce a high similar to marijuana. Synthetic cannabinoids can be classified into eight general groups, based on the type of chemical alteration made to the original substance: tetrahydrocannabinols; naphthoylindoles; naphthylmethylindoles; naphthoylpyrroles; naphthylideneindenes or naphthylmethylindenes; Phenylacetylindoles; cyclohexylphenols; and benzoylindoles. *See, Synthetic Drug Threats*. National Conference of State Legislatures, August 23, 2012. (<http://www.ncsl.org/issues-research/justice/synthetic-drug-threats.aspx>)(last visited on September 24, 2012).

<sup>15</sup> Substituted cathinones, commonly known by their street name, “bath salts,” are derivatives of cathinone, a psychoactive substance with stimulant properties occurring naturally in the *khat* plant. The effects of substituted cathinones are similar to amphetamines like ecstasy and cocaine. The four most widely recognized substituted cathinones are mephedrone, MDVP, methylone and methedrone. *See, Synthetic Drug Threats*. National Conference of State Legislatures, August 23, 2012. (<http://www.ncsl.org/?tabid=21398>)(last visited on September 24, 2012).

<sup>16</sup> *See, Bath Salts: Use of Dangerous Drug Increasing Across U.S.* ABC News, June 5, 2012. (<http://abcnews.go.com/Health/bath-salts-dangerous-drug-increasing-us/story?id=16496076>)(last visited on October 4, 2012).

<sup>17</sup> *Synthetic Drugs (a.k.a. K2, Spice, Bath Salts, etc.) Overview and History*. Office of National Drug Control Policy. (<http://www.whitehouse.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts>)(last visited on September 24, 2012).

<sup>18</sup> *See, Florida Fusion Center, Unit Reporting: Office of Statewide Intelligence. “Bath Salts” Receive Emergency Drug Scheduling*. Brief # 10-194 Public, January 26, 2011. ([http://www.fdle.state.fl.us/Content/BathSalts/FDLEBrief10\\_194BathSaltsPublic.pdf](http://www.fdle.state.fl.us/Content/BathSalts/FDLEBrief10_194BathSaltsPublic.pdf))(last visited on September 24, 2012). *See also, Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I*. Federal Register, The Daily Journal of the United States Government, November 24, 2010 (<https://www.federalregister.gov/articles/2010/11/24/2010-29600/schedules-of-controlled-substances-temporary-placement-of-five-synthetic-cannabinoids-into-schedule>)(last visited on September 24, 2012).

<sup>19</sup> *Id.*

<sup>20</sup> *See, Synthetic Marijuana Causing Intoxication in Kids*. ABC News, March 19, 2012. (<http://abcnews.go.com/Health/fake-pot-sending-increasing-number-kids-er/story?id=15940721>)(last visited on October 4, 2012).

<sup>21</sup> *Bath Salts Data*. American Association of Poison Control Centers. Updated May, 23, 2012. (On file with House Criminal Justice Subcommittee).

<sup>22</sup> Email from Dawn R. Sollee, Pharm.D., DABAT. Assistant Director, Florida/USVI Poison Information Center-Jacksonville At Shands Jacksonville. October 24, 2012. (On file with House Criminal Justice Subcommittee staff).

## **REGULATING DESIGNER DRUGS**

Generally, a substance cannot be regulated unless it is listed in the drug schedules. This concept proves problematic when designer drugs are created that are not scheduled under the Drug Control Act, but which have a potential for abuse similar to or greater than those substances that are scheduled. Florida has regulated designer drugs using various approaches.

### **Scheduling Designer Drugs Legislatively**

When a new and potentially harmful designer drug is identified, Florida has generally responded by enacting legislation that lists the substance in the appropriate drug schedule. For example, during the 2011 Legislative Session, House Bill 39 and 1039 passed, adding 11 synthetic cannabinoid and bath salts substances to Schedule I.

Subsequently, new formulas of synthetic cannabinoids and bath salts were developed that were made up of slightly different chemical substances not covered under the 2011 law. The Legislature responded the following year by passing House Bill 1175, which added 92 synthetic cannabinoid and bath salt substances to Schedule I. Since the 2012 legislation passed, additional synthetic cannabinoid and bath salt substances have been developed that are not covered under either the 2011 or 2012 law.

Enacting legislation to schedule specific designer drugs gives the public clear notice of what drugs are scheduled and consequently when the possession, sale, etc., of such drugs is a crime. However, since the Legislature only meets once a year for 60 days, designer drugs can be created more rapidly than they can be identified and controlled by action of the Legislature.

### **Scheduling Designer Drugs by Rule**

Section 893.035, F.S., provides a mechanism by which Florida's Attorney General can temporarily schedule a substance by rule. This statute, enacted in 1985, authorizes the Attorney General to use the rulemaking procedures in ch. 120, F.S., to:

- Add a substance to a schedule, or transfer a substance between schedules, if he or she finds that it has a potential for abuse, and or makes the other findings appropriate for classification in the particular schedule under s. 893.03, F.S., in which it is to be placed;<sup>23</sup> and
- Remove a substance previously added to a schedule if he or she finds the substance does not meet the requirements for inclusion in that schedule.<sup>24</sup>

Prior to initiating temporary scheduling proceedings, the Attorney General must request the Department of Health (DOH) and the Department of Law Enforcement (FDLE) to provide a

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<sup>23</sup> In making these findings, the Attorney General must consider the following with respect to each substance proposed to be controlled or removed from control:

- Its actual or relative potential for abuse.
- Scientific evidence of its pharmacological effect, if known.
- The state of current scientific knowledge regarding the drug or other substance.
- Its history and current pattern of abuse.
- The scope, duration, and significance of abuse.
- What, if any, risk there is to the public health.
- Its psychic or physiological dependence liability.
- Whether the substance is an immediate precursor of a substance already controlled under this ch. 893, F.S.

<sup>24</sup> Section 893.035(2), F.S.

medical and scientific evaluation of the substance as well as a recommendation as to the appropriate classification of the substance.<sup>25</sup> After reviewing this data, the Attorney General can proceed with scheduling proceedings unless both DOH and FDLE recommend that the substance not be controlled.<sup>26</sup>

Section 893.035, F.S., also creates an emergency rulemaking process<sup>27</sup> in which the Attorney General can schedule a substance. This process can only be used in instances where the Attorney General finds that a scheduling of a substance in Schedule I on a temporary basis is necessary to avoid an imminent hazard to public safety.<sup>28</sup> Under the emergency scheduling process, the Attorney General does not have to obtain input from DOH or FDLE before initiating proceedings.<sup>29</sup>

The Attorney General must report to the Legislature any rules adopted pursuant to s. 893.035, F.S., by March 1 of each year.<sup>30</sup> This gives the Legislature the opportunity to enact legislation scheduling the substances identified by the Attorney General. However, if the Legislature does not enact such legislation, the rule expires on June 30.<sup>31</sup>

Florida has recently used the rulemaking process to schedule designer drugs. In January 2011, Florida Attorney General Pam Bondi exercised her emergency rulemaking authority to temporarily schedule certain bath salts as a Schedule I substance.<sup>32</sup> Attorney General Bondi stated that “[d]ue to the violent nature of the side effects involved in taking these drugs, the emergency rule will provide law enforcement with the tools necessary to take this dangerous substance off the shelves and protect the abusers from themselves as well as others. These are dangerous drugs that should not be confused with any type of common bath product.”<sup>33</sup>

Scheduling substances using the rulemaking process in s. 893.035, F.S., is advantageous in that it allows potentially harmful substances to be regulated more rapidly and in times when the Legislature is not in session. This not only increases public safety, but also gives medical and law enforcement agencies time to examine a drug carefully before recommending a permanent control of the substance. However, the disadvantage to this process is that any rules adopted expire unless adopted by the Legislature.

### **The Controlled Substance Analogue Statute**

As noted above, the term “controlled substance” is defined as any substance named or described in the drug schedules for purposes of the Drug Control Act. What must also be noted is that the

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<sup>25</sup> Section 893.035(5), F.S.

<sup>26</sup> *Id.*

<sup>27</sup> Using the emergency rulemaking provisions found in s. 120.54(4), F.S.

<sup>28</sup> Section 893.035(7), F.S.

<sup>29</sup> *Id.*

<sup>30</sup> Section 893.035(9), F.S.

<sup>31</sup> *Id.*

<sup>32</sup> Office of the Attorney General of Florida Pam Bondi, New Release: *Attorney General Bondi Files Emergency Rule Banning the Dangerous Synthetic Drug Marketed as "Bath Salts"* January 26, 2011. (<http://www.myfloridalegal.com/newsrel.nsf/newsreleases/81CC463863D88DC4852578240077FD45>)(last visited on October 4, 2012).

<sup>33</sup> *Id.*

drug schedules often specify that a listed substance's isomers;<sup>34</sup> esters;<sup>35</sup> ethers;<sup>36</sup> salts;<sup>37</sup> and salts of isomers, esters, and ethers are also considered a controlled substance.<sup>38</sup>

Despite this seemingly all-inclusive language, harmful substances have been created that do not meet the current definition of a controlled substance—either because they are not specifically listed in the drug schedules or because they are not an isomer, ester, ether, or salt of a substance listed in the drug schedules. Many of these substances are specifically created to produce a desired pharmacological effect, to be used as substitutes for controlled substances, and to evade the criminal provisions of the Drug Control Act.<sup>39</sup> In an effort to regulate these types of substances, the Legislature created s. 893.0356, F.S., commonly referred to as the Analogue Statute.

The Analogue Statute, created in 1987 and largely mirrored after the Federal Controlled Substance Analogue Enforcement Act (AEA),<sup>40</sup> requires a controlled substance analogue to be treated as a controlled substance in Schedule I for purposes of the Drug Control Act.<sup>41</sup> This means that the criminal penalties for possessing, selling, manufacturing, etc., a controlled substance analogue are the same as those for possessing, selling, manufacturing, etc., a controlled substance listed in Schedule I.

The statute defines a “controlled substance analogue” as a substance which, due to its chemical structure and potential for abuse, meets the following criteria:

- Is substantially similar to a controlled substance listed in Schedule I or Schedule II; and
- Is represented or intended to have or actually has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than that of a controlled substance listed in Schedule I or Schedule II.<sup>42</sup>

However, the term does not include:

- A controlled substance;
- Any substance for which there is an approved new drug application;
- Any compound, mixture, or preparation which contains any controlled substance which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse; or

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<sup>34</sup> “Isomer” is defined as any of two or more compounds, radicals, or ions that contain the same number of atoms of the same elements but differ in structural arrangement and properties. *See*, <http://www.merriam-webster.com/medical/isomer> (last visited on October 28, 2012).

<sup>35</sup> “Ester” is defined as any of a class of often fragrant compounds that can be represented by the formula RCOOR' and that are usually formed by the reaction between an acid and an alcohol usually with elimination of water. *See*, <http://www.merriam-webster.com/medical/ester> (last visited October 28, 2012).

<sup>36</sup> “Ether” is defined as any of various organic compounds characterized by an oxygen atom attached to two carbon atoms. *See*, <http://www.merriam-webster.com/medical/ether> (last visited October 28, 2012).

<sup>37</sup> “Salt” is defined as any of numerous compounds that result from replacement of part or all of the acid hydrogen of an acid by a metal or a group acting like a metal : an ionic crystalline compound. *See*, <http://www.merriam-webster.com/medical/salt> (last visited October 28, 2012).

<sup>38</sup> *See*, e.g., s. 893.03(1)(a), F.S.

<sup>39</sup> Section 893.0356(1), F.S.

<sup>40</sup> *See*, 21 USC s. 802(32)(A) (2012).

<sup>41</sup> Section 893.0356(5), F.S.

<sup>42</sup> Section 893.0356(2)(a), F.S.

- Any substance to which an investigational exemption applies under s. 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 355,<sup>43</sup> but only to the extent that conduct with respect to the substance is pursuant to such exemption.<sup>44</sup>

The Analogue Statute specifies that the following factors are relevant to a finding that a substance is a controlled substance analogue:

- Its actual or relative potential for abuse.
- Scientific evidence of its pharmacological effect, if known.
- The state of current scientific knowledge regarding the substance.
- Its history and current pattern of abuse.
- The scope, duration, and significance of abuse.
- What, if any, risk there is to the public health.
- Its psychic or physiological dependence liability.
- Its diversion from legitimate channels, and clandestine importation, manufacture, or distribution.
- Whether the substance is an immediate precursor of a substance already controlled under this chapter.<sup>45</sup>

It is unknown how often the Analogue Statute has been used to prosecute those who possess, sell, manufacture, etc. designer drugs. However, discussions with state attorneys suggest that the statute has rarely been used because of the difficulty and expense in proving that a substance is a controlled substance analogue.<sup>46</sup> Despite these concerns, state attorneys recognize that the Analogue Statute is beneficial in that it provides a mechanism to prosecute those abusing, manufacturing, and selling designer drugs.<sup>47</sup>

### **Concerns with Regulating Designer Drugs**

As noted above, each method of regulating designer drugs has disadvantages. Using the legislative process to schedule newly created designer drugs is not practical given the speed and frequency with which designer drugs are created. Similarly, using the rulemaking process to schedule designer drugs requires action by the Legislature for such rules to become permanent. And while the Analogue Statute appears to be designed to specifically address designer drugs, its provisions have rarely been used.

In addition to these concerns, one must also consider the forensic and fiscal impact of regulating designer drugs. Since manufacturers of designer drugs are constantly changing the types of chemical substances they use, it is vital that each substance be subjected to its own extensive review before being legislatively added to a drug schedule. Without such review, a substance that has a beneficial medical purpose could be placed in an incorrect schedule. As designer drugs continue to emerge, the necessary evaluation of these substances will likely become cumbersome and costly for Florida's medical and law enforcement agencies.

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<sup>43</sup> Section 505(i) of the Food, Drug, and Cosmetics Act, authorizes the Secretary of Health and Human Services to promulgate regulations for exemptions for drugs that are manufactured, distributed, or possessed solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs. *See*, 21 U.S.C. 355(i).

<sup>44</sup> Section 893.0356(2)(b), F.S.

<sup>45</sup> Section 893.0356(4), F.S.

<sup>46</sup> E-mail from Buddy Jacobs dated October 25, 2012 (on file with Criminal Justice Subcommittee staff).

<sup>47</sup> *Id.*

Similarly, the costs relating to investigating and prosecuting designer drug cases will likely increase as the evidence necessary to successfully prosecute such cases will rely more heavily on scientific evidence and expert testimony. In 2012, when 92 additional synthetic cannabinoids and bath salts were added to Schedule I, FDLE stated that the addition of the substances to Schedule I “could potentially increase the number of evidence submissions into FDLE’s Crime Laboratory System. The lab system will need to acquire all of the required standards necessary to test the proposed chemical substances.”<sup>48</sup> FDLE also noted that “local agencies which fund and maintain their own crime lab with a chemistry section would potentially be facing a similar rise in submissions associated with the additions of the proposed chemical substances.”<sup>49</sup>

Jeffery H. Moran, branch chief of the Public Health Laboratory at the Arkansas Department of Health, stated the following in respect to investigating designer drugs:

Assessing the impact of new, emerging designer drugs such as synthetic cannabinoids presents a unique challenge for the biomedical research community. Scientists and public health officials must keep up with what seems to be an almost endless supply of structurally distinct compounds of potential abuse. At the same time, they are being asked to characterize both the pharmacology of these synthetics and the extent to which public health is threatened. This challenge is increasingly difficult in light of reductions in governmental discretionary spending. Moreover, enforcement agencies do not have adequate capacity to take on the additional burden of clinical research and clinical sample analysis.<sup>50</sup>

## **HOW OTHER STATES HAVE REGULATED DESIGNER DRUGS**

In recent years, others states have made efforts to regulate designer drugs. Many of these states have done so using one or more of the approaches used in Florida (i.e, they schedule designer drugs legislatively, by rule, or through a controlled substance analogue statute). However, a handful of states, in recognition of the unique nature of designer drugs and the frequency with which such drugs are created, have created a new approach to regulation.

### **The “General Class” Approach**

As discussed above, adding a specific chemical compound to a drug schedule has been the most common approach states have used to regulate designer drugs. This usually must be done every year as new chemical compounds of designer drugs are being created almost daily. Alternately, states are using analogue statutes, which do not specify any chemical compounds but instead define an analogue as being substantially similar to a chemical compound *already listed* in a drug schedule. Recently, states have begun using what is referred to as the “General Class” approach to regulate designer drugs – specifically synthetic cannabinoids and bath salts.

#### *Synthetic Cannabinoids*

For synthetic cannabinoids, the General Class approach can be thought of as a hybrid of the approaches described above. Instead of scheduling individual synthetic cannabinoid chemical

<sup>48</sup> See, Florida Department of Law Enforcement Analysis to HB 1175 relating to Controlled Substances. January 12, 2012. (On file with House Criminal Justice Subcommittee).

<sup>49</sup> *Id.*

<sup>50</sup> Jeffery H. Moran. *Smart resource allocation needed to study 'legal highs.'* Nature Medicine. Vol. 17, n. 11. November 2011.

compounds, this approach identifies the eight *general chemical classes* associated with synthetic cannabinoids and then bans the chemical compounds included within each class.<sup>51</sup>

### *Bath Salts*

In relation to bath salts, the General Class approach is slightly more simple. Recognizing that all bath salts are substituted cathinones, this approach identifies the general “substituted cathinones class” and then bans the chemical compounds included in such class.<sup>52</sup>

### **Concerns with the General Class Approach**

One of the primary concerns with the General Class approach stems from its broad language. The complexity of the chemical compounds of designer drugs can make it difficult to impose a broad ban on such substances without unintentionally including compounds that have legitimate uses. This concern was recently articulated by an FDLE official who stated, “We want to cast a net to get all of the synthetic drugs within the net, but we don’t want to be so broad.”<sup>53</sup>

Vagueness concerns have also been raised. A criminal law may violate due process if it fails to give a person fair notice that his or her contemplated conduct is forbidden or if it encourages arbitrary enforcement and gives the police too much discretion in determining whether it is applicable to a particular individual.<sup>54</sup> When the law fails these tests, it is “void for vagueness.”<sup>55</sup> A statute is not void for vagueness if the language conveys a “sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.”<sup>56</sup>

The General Class approach does not schedule specific chemical compounds, but instead schedules broader classes of chemicals. It could be argued that such laws do not give a person fair notice of what conduct (i.e., what types of substances) are forbidden, and therefore are vague. This argument is strengthened since drug schedules are often used to criminally prosecute individuals who possess, sell, etc. scheduled substances. As stated by the Florida Supreme Court, “the need for definiteness is even greater when the ordinance imposes criminal penalties on individual behavior or when it implicates constitutionally protected rights.”<sup>57</sup>

Members of FDLE’s Chemistry Discipline acknowledged the following vagueness concerns in analyzing Georgia Senate Bill 370:

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<sup>51</sup> *Synthetic Drug Threats*, August 23, 2012. National Conference of State Legislatures. (<http://www.ncsl.org/issues-research/justice/synthetic-drug-threats.aspx>)(last visited on October 30, 2012); also see, *Synthetic Cannabinoid Chemical Classes and Their Trade Names*, September 17, 2012. National Conference of State Legislatures. (<http://www.ncsl.org/issues-research/justice/synthetic-cannabinoid-chemical-classes.aspx>)(last visited on October 30, 2012).

<sup>52</sup> *Synthetic Drug Threats*, August 23, 2012. National Conference of State Legislatures. (<http://www.ncsl.org/issues-research/justice/synthetic-drug-threats.aspx>)(last visited on October 30, 2012); also see, *Substituted Cathinones Chemical Classes and Their Trade Names*, September 17, 2012. National Conference of State Legislatures. (<http://www.ncsl.org/issues-research/justice/substituted-cathinones-chemical-classes.aspx>)(last visited on October 30, 2012).

<sup>53</sup> See, *State considering additional bans of synthetic drugs*. SunSentinel.com, June 11, 2012. ([http://articles.sun-sentinel.com/2012-06-11/news/fl-legislation-drugs-zombie-20120611\\_1\\_synthetic-drugs-ivory-wave-synthetic-marijuana](http://articles.sun-sentinel.com/2012-06-11/news/fl-legislation-drugs-zombie-20120611_1_synthetic-drugs-ivory-wave-synthetic-marijuana))(last visited on September 24, 2012).

<sup>54</sup> *Simmons v. State*, 944 So.2d 317, at 324 (Fla. 2006).

<sup>55</sup> *Id.* (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972)).

<sup>56</sup> *Simmons*, 944 So.2d at 324 (citing *Hitchcock v. State*, 413 So.2d 741, 747 (Fla.1982), quoting *United States v. Petrillo*, 332 U.S. 1, 8 (1947)).

<sup>57</sup> *Simmons*, 944 So.2d at 324.



To identify a substance the analyst must have the correct standard for comparison purposes, and the proper instrumentation to differentiate between very similar substances. The lack of standards (not just that we don't have them, but that proper pharmaceutical standards do not exist) will make it absolutely impossible to identify a great many substances that would fall under this type of statute. The identification may well require instrumentation we do not have available in the laboratories. The lack of knowledge regarding the pharmacology of the product makes it impossible to know when a substance may or may not fall under the statute. Therefore, this type of blanket language is too vague to be utilized from an analytical perspective.

This vague language also makes it impossible for the citizens to know what is truly legal or illegal, bringing serious constitutionality issues into play. With such general terms, a lay person cannot be reasonably expected to know what falls in those classes and what doesn't.<sup>58</sup>

## FEDERAL ACTIONS

The federal government has also enacted law to combat designer drugs. These laws regulate designer drugs using drug schedules, emergency orders, analogue statutes, and in some instances, by using a general class approach.

### **The Federal Controlled Substances Act**

The Controlled Substances Act (CSA) is a consolidation of numerous laws regulating the manufacture and distribution of narcotics, stimulants, depressants, and other chemicals used in the illicit production of controlled substances, which are enforced by the Drug Enforcement Administration (DEA). Substances regulated under the CSA are placed into one of five schedules based upon the substance's accepted medical use, potential for abuse or addiction, and possible effects.<sup>59</sup> Any substance listed in the drug schedules is considered a "controlled substance."<sup>60</sup>

The federal drug schedules are used in conjunction with federal criminal statutes that criminalize behavior related to controlled substances. The penalty for violating such statutes depends largely on what schedule the substance is listed in.<sup>61</sup>

### *Scheduling Designer Drugs Legislatively*

When a new and potentially harmful designer drug is identified, the federal government has responded by enacting legislation listing the specific chemical compound of the drug in the appropriate drug schedule. For example, on July 9, 2012, President Obama signed into law the Food and Drug Administration Safety and Innovation Act (FDASIA), which added the following bath salt substances to Schedule I:

- 4-methylmethcathinone (Mephedrone).
- 3,4-methylenedioxypropylvalerone (MDPV).<sup>62</sup>

<sup>58</sup> Email message from Barbara A. Vohlken, Technical Leader, FDLE Chemistry Discipline. April 23, 2012 (On file with House Criminal Justice Subcommittee).

<sup>59</sup> See, 21 U.S.C. s. 812.

<sup>60</sup> See, 21 U.S.C. s. 802(6).

<sup>61</sup> See, e.g., 21 U.S.C. s. 841(b)(1)(C).

While supporters have praised the FDASIA, others have found problems with the federal law. Anthony Tambasco, a forensic scientist in Mansfield, Ohio, said the federal law helps in regards that the drugs needed to be listed and controlled, “but you’ll have, again, new compounds coming through the door that we’ll have to deal with.”<sup>63</sup>

### *Scheduling Designer Drugs by Rule*

The CSA also provides a process whereby substances can be added to the federal drug schedules by the United States Attorney General (USAG) by rule. Section 811 of the CSA authorizes the USAG to initiate proceedings to add (or transfer) a substance to a drug schedule if he or she:

- Finds that such substance has a potential for abuse; and
- Makes the findings required by 21 U.S.C. 812(b) for the schedule in which such drug is to be placed.<sup>64</sup>

The USAG can initiate proceedings to remove a substance from a drug schedule if he or she finds that it does not meet the requirements for inclusion in any drug schedule.<sup>65</sup> Prior to initiating such proceedings, the USAG must request the Secretary of Health and Human Services (Secretary) to provide a scientific and medical evaluation and a recommendation as to whether the substance should be added, transferred, or removed.<sup>66</sup> If the USAG determines that scientific and medical evaluation along with all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence to warrant removal from the drug schedules, he is authorized to initiate proceedings for control of a substance by placement in a schedule.<sup>67</sup>

The CSA also creates a temporary rulemaking process in which the USAG can schedule a substance in Schedule I on a temporary basis if he or she finds that doing so is necessary to avoid an imminent hazard to public safety.<sup>68</sup> Under the temporary scheduling process, the USAG does not have to obtain input from Secretary before initiating proceedings.<sup>69</sup> The temporary scheduling of a substance expires two years from the date of the issuance of the order scheduling such substance.<sup>70</sup> However the Attorney General may extend the temporary scheduling, under certain conditions, for up to one year.<sup>71</sup>

The DEA has recently used the rulemaking process to schedule designer drugs. On November 24, 2010, the Drug Enforcement Administration (DEA) published a Notice of Intent to temporarily place five synthetic cannabinoids into Schedule I pursuant to the temporary

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<sup>62</sup> Public Law No: 112-144.

<sup>63</sup> *Fake Pot Is A Real Problem For Regulators*, National Public Radio. July 12, 2012 (<http://www.npr.org/2012/07/12/156615024/fake-pot-is-a-real-problem-for-regulators>)(last visited on September 24, 2012).

<sup>64</sup> 21 U.S.C. 811(a)(1).

<sup>65</sup> 21 U.S.C. s. 811(a)(2).

<sup>66</sup> In making such evaluation and recommendation, the Secretary must consider certain factors. 21 U.S.C. s. 811(b).

<sup>67</sup> Note that the USAG cannot initiate scheduling proceedings if the Secretary recommends that a substance not be controlled. 21 U.S.C, s. 811(b).

<sup>68</sup> 21 U.S.C. 811(h)(1).

<sup>69</sup> *Id.*

<sup>70</sup> 21 U.S.C. s. 811(h)(2).

<sup>71</sup> *Id.*

scheduling provisions of the CSA.<sup>72</sup> Subsequently, on March 1, 2011, a Final Order was published that temporarily placed the five synthetic cannabinoids into Schedule I of the CSA pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h).<sup>73</sup> The Final Order, which became effective on the date of publication, was based on findings that the temporary scheduling of the five synthetic cannabinoids was necessary to avoid an imminent hazard to the public safety.<sup>74</sup>

#### *The Federal Controlled Substance Analogue Enforcement Act*

Controlled substance analogs are regulated at the federal level under the Federal Controlled Substance Analogue Enforcement Act (AEA).<sup>75</sup> Federal law defines the term “controlled substance analogue” as a substance:

- The chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or II;
- Which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II; or
- With respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II.<sup>76</sup>

Under federal law, a controlled substance analogue, to the extent intended for human consumption, must be treated as a controlled substance in Schedule I.<sup>77</sup>

While there appears to be no U.S. Supreme Court cases addressing vagueness in the AEA, a number of U.S. circuit courts have addressed vagueness challenges to the law and have upheld it, even when applied to a broad range of designer drugs.<sup>78</sup> However, some researchers still argue that the AEA’s vagueness has caused less drug-related prosecutions. According to Jeffery Moran, branch chief of the Public Health Laboratory at the Arkansas Department of Health, prior to November 2011, there were only 70 prosecutions brought under the AEA because its vagueness prevents prosecutors from being certain that it applies.<sup>79</sup>

#### *General Class Approach*

As noted above, the FDASIA listed specific chemical compounds of bath salts in Schedule I. However, the FDASIA also used the General Class approach to add cannabimimetic agents

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<sup>72</sup> Federal Register Volume 77, Number 41. FR Doc No: 2012-4982. Thursday, March 1, 2012. ([http://www.deadiversion.usdoj.gov/fed\\_regs/rules/2012/fr0301\\_3.htm](http://www.deadiversion.usdoj.gov/fed_regs/rules/2012/fr0301_3.htm))(last visited on October 31, 2012).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Public Law No. 99-570.

<sup>76</sup> 21 U.S.C. s. 802(32)(A). The elements for determining an analog substance listed in the AEA are meant to be read conjunctively. *See, U.S. v. Turcotte*, 405 F.3d 515 (7<sup>th</sup> Cir. 2005).

<sup>77</sup> 21 U.S.C. s. 813.

<sup>78</sup> *See, Us v. Grandberry*, 916 F.2d 1008 (9<sup>th</sup> Cir. 1990); *U.S. v. Turcotte*, 405 F.3d 515 (7<sup>th</sup> Cir. 2005); *US v. Carlson*, 87 F.3d 440 (11<sup>th</sup> Cir. 1996); *U.S. v. Hoffstatter*, 8 F.3d 316 (6<sup>th</sup> Cir. 1993); *U.S. v. Klecker*, 348 F.3d 69 (4<sup>th</sup> Cir. 2003); *U.S. v. Washam*, 312 F.3d 926 (8<sup>th</sup> Cir. 2002).

<sup>79</sup> Jeffery H. Moran. *Smart resource allocation needed to study 'legal highs.'* Nature Medicine. Vol. 17, n. 11. November 2011.

(synthetic cannabinoids) to Schedule I.<sup>80</sup> The term “cannabimimetic agents” is defined as any substance that is a cannabinoid receptor type 1 (CB1 receptor) agonist as demonstrated by binding studies and functional assays within any of the following structural classes:

- 2-(3-hydroxycyclohexyl)phenol with substitution at the 5-position of the phenolic ring by alkyl or alkenyl, whether or not substituted on the cyclohexyl ring to any extent.
- 3-(1-naphthoyl)indole or 3-(1-naphthylmethane)indole by substitution at the nitrogen atom of the indole ring, whether or not further substituted on the indole ring to any extent, whether or not substituted on the naphthoyl or naphthyl ring to any extent.
- 3-(1-naphthoyl)pyrrole by substitution at the nitrogen atom of the pyrrole ring, whether or not further substituted in the pyrrole ring to any extent, whether or not substituted on the naphthoyl ring to any extent.
- 1-(1-naphthylmethylene)indene by substitution of the 3-position of the indene ring, whether or not further substituted in the indene ring to any extent, whether or not substituted on the naphthyl ring to any extent.
- 3-phenylacetylindole or 3-benzoylindole by substitution at the nitrogen atom of the indole ring, whether or not further substituted in the indole ring to any extent, whether or not substituted on the phenyl ring to any extent.<sup>81</sup>

The statute further specifies that the term includes:

- 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497);
- 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP-47,497 C8-homolog);
- 1-pentyl-3-(1-naphthoyl)indole (JWH-018 and AM678);
- 1-butyl-3-(1-naphthoyl)indole (JWH-073);
- 1-hexyl-3-(1-naphthoyl)indole (JWH-019);
- 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200);
- 1-pentyl-3-(2-methoxyphenylacetyl)indole (JWH-250);
- 1-pentyl-3-[1-(4-methoxynaphthoyl)]indole (JWH-081);
- 1-pentyl-3-(4-methyl-1-naphthoyl)indole (JWH-122);
- 1-pentyl-3-(4-chloro-1-naphthoyl)indole (JWH-398);
- 1-(5-fluoropentyl)-3-(1-naphthoyl)indole (AM2201);
- 1-(5-fluoropentyl)-3-(2-iodobenzoyl)indole (AM694);
- 1-pentyl-3-[(4-methoxy)-benzoyl]indole (SR-19 and RCS-4);
- 1-cyclohexylethyl-3-(2-methoxyphenylacetyl)indole (SR-18 and RCS-8); and
- 1-pentyl-3-(2-chlorophenylacetyl)indole (JWH-203).<sup>82</sup>

## CONCLUSION

Each of the regulatory approaches discussed in this paper has advantages and disadvantages. Legislatively scheduling specific chemical compounds of designer drugs gives the public clear notice of what drugs are scheduled and consequently when the possession, sale, etc., of such drugs is a crime. However, designer drugs can be created more rapidly than they can be identified and controlled by action of the Legislature. Enabling an entity to schedule a designer drug by rule is advantageous in that it allows states to quickly regulate potentially dangerous

<sup>80</sup> Public Law No. 112-144.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

drugs. However, such processes are generally only a temporary solution. And while controlled substance analogue statutes appear to be designed to regulate designer drugs, such statutes seem to be rarely used due to evidentiary burdens and fiscal costs.

The General Class approach to regulating designer drugs has yet to be challenged. However, it is anticipated that such laws will be challenged as being too broad and vague. Until the courts weigh in, the validity of these statutes will be in question, as will their practicality.

Preventing the ways in which manufacturers alter the chemical compounds of designer drugs in order to sell them legally may be a never-ending battle for lawmakers. However, because the dangers associated with many of these drugs is so great, Florida must continue to take steps to regulate them.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CRJS 13-01 Massage Establishments
SPONSOR(S): Criminal Justice Subcommittee
TIED BILLS: IDEN./SIM. BILLS:

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR or BUDGET/POLICY CHIEF. Row 1: Orig. Comm.: Criminal Justice Subcommittee, Cunningham, Cunningham

SUMMARY ANALYSIS

Chapter 480, F.S., entitled the "Massage Practice Act" (Act), governs the practice of massage in Florida. A significant portion of the Act is dedicated to regulating massage establishments, which are defined as "a site or premises, or portion thereof, wherein a massage therapist practices massage."

The Act currently contains numerous provisions prohibiting operators of massage establishments from committing a variety of acts. Both administrative and criminal penalties may be imposed upon those who do. These provisions help in preventing illegal activity in massage establishments.

The bill amends the Act to create additional prohibitions that are designed to curb illegal activity in massage establishments. Specifically, the bill creates s. 480.0475, F.S., which makes it a first degree misdemeanor for:

- A person to operate a massage establishment between the hours of 10:00 p.m. and 6:00 a.m.; or
A person operating a massage establishment to use or permit such establishment to be used as a principle domicile unless the establishment is zoned for residential use under local ordinance.

A third or subsequent violation is a third degree felony.

The prohibition relating to operating hours does not apply to massage establishments:

- Located on the premises of a health care facility, hotel, motel, or a bed and breakfast inn; or
In which every massage performed between the hours of 10:00 p.m. and 6:00 a.m. are performed by a massage therapist acting under the direction of a physician or physician assistant, an osteopathic physician or physician assistant, a chiropractic physician, a podiatric physician, an advanced registered nurse, or a dentist.

The bill also amends s. 823.05, F.S., to declare massage establishments that operate in violation of the above-described provisions (and s. 480.0535(2), F.S., which requires massage establishment operators to provide identification upon request of a law enforcement officer) a nuisance that may be abated or enjoined as provided in ss. 60.05 and 60.06, F.S.

Because the bill creates new offenses punishable as misdemeanors and felonies, it may have a negative jail bed impact on local governments as well as a negative prison bed impact on the Department of Corrections.

The bill is effective October 1, 2013.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Massage Establishments**

In October 2010, the Center for the Advancement of Human Rights at Florida State University provided the Florida Task Force on Human Trafficking a "Statewide Strategic Plan on Human Trafficking."<sup>1</sup> The Strategic Plan found that Florida is the third most popular American destination for human traffickers and that sex trafficking is the most under-reported offense.<sup>2</sup> The Strategic Plan noted that massage establishments have been noted as sites where trafficking occurs.<sup>3</sup>

Chapter 480, F.S., entitled the "Massage Practice Act" (Act), governs the practice of massage<sup>4</sup> in Florida. A significant portion of the Act is dedicated to regulating massage establishments, which are defined as "a site or premises, or portion thereof, wherein a massage therapist practices massage."<sup>5</sup>

Massage establishments may only operate if they have applied for and received a license from the Department of Health (DOH) in accordance with rules adopted by the Board of Massage Therapy (Board).<sup>6</sup> The Board's rules:

- Govern the operation of massage establishments and their facilities, personnel, safety and sanitary requirements, financial responsibility, insurance coverage;
- Require DOH to inspect a proposed massage establishment upon receipt of an application for licensure to ensure that the site is to be utilized for massage; and
- Require DOH to periodically inspect licensed massage establishments at least once a year.<sup>7</sup>

The Act sets forth a multitude of instances in which an operator of a massage establishment can be administratively disciplined. These include:

- Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of massage or to the ability to practice massage;
- False, deceptive, or misleading advertising;
- Aiding, assisting, procuring, or advising any unlicensed person to practice massage contrary to the provisions of the Act or to a rule of the Board;
- Making deceptive, untrue, or fraudulent representations in the practice of massage;
- Violating a lawful order of the Board previously entered in a disciplinary hearing;
- Refusing to permit the department to inspect the business premises of the licensee during regular business hours; and
- Failing to keep the equipment and premises of the massage establishment in a clean and sanitary condition.<sup>8</sup>

Operators of massage establishments may also be administratively disciplined for violating *any provision* of the Act or ch. 456, F.S.,<sup>9</sup> or any rules adopted pursuant thereto.<sup>10</sup>

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<sup>1</sup> The plan is available and can be viewed at [http://www.cahr.fsu.edu/sub\\_category/Florida\\_StrategicPlanonHumanTrafficking.html](http://www.cahr.fsu.edu/sub_category/Florida_StrategicPlanonHumanTrafficking.html) (last visited January 9, 2013).

<sup>2</sup> Page 3 of the Strategic Plan.

<sup>3</sup> Page 11 of the Strategic Plan.

<sup>4</sup> The term "massage" is defined as the manipulation of the soft tissues of the human body with the hand, foot, arm, or elbow, whether or not such manipulation is aided by hydrotherapy, including colonic irrigation, or thermal therapy; any electrical or mechanical device; or the application to the human body of a chemical or herbal preparation. Section 480.033(3), F.S.

<sup>5</sup> Section 480.033(7), F.S.

<sup>6</sup> Section 480.043(1), F.S.

<sup>7</sup> See Rules 64B7-26.003, 64B7-26.004, and 64B7-26.005, F.A.C.

<sup>8</sup> Section 480.046(1), F.S.

<sup>9</sup> Chapter 456, F.S., regulates health professions and occupations.

<sup>10</sup> Section 480.046(1)(o), F.S.



The Board can deny licensure or impose disciplinary action against a licensee that violates the Act.<sup>11</sup> Disciplinary action includes:

- Refuse to certify, or certify with restrictions, an application for a license;
- Suspend or permanently revoke a license;
- Restrict one's practice or license;
- Impose an administrative fine not to exceed \$10,000 for each count or separate offense; and
- Place the licensee on probation for a period of time and subject to such conditions as the Board may specify.<sup>12</sup>

The Board can also revoke or suspend the license of a massage establishment in the following instances:

- Upon proof that a license has been obtained by fraud or misrepresentation; or
- Upon proof that the holder of a license is guilty of fraud or deceit or of gross negligence, incompetency, or misconduct in the operation of the establishment so licensed.<sup>13</sup>

The Board has adopted a rule<sup>14</sup> outlining the disciplinary guidelines to be used when it finds that an applicant or licensee has violated the Act.<sup>15</sup> These guidelines range from small fines for first-time minor violations to large fines and license revocation for more serious violations.<sup>16</sup>

The Act also imposes criminal penalties for certain violations. Section 480.047, F.S., makes it a first degree misdemeanor<sup>17</sup> for a person to:

- Hold himself or herself out as a massage therapist or to practice massage unless duly licensed under the Act or unless otherwise specifically exempted from licensure under the Act;
- Operate any massage establishment unless it has been duly licensed;
- Permit an employed person to practice massage unless duly licensed;
- Present as his or her own the license of another;
- Allow the use of his or her license by an unlicensed person;
- Give false or forged evidence to DOH in obtaining any license;
- Falsely impersonate any other license-holder of like or different name;
- Use or attempt to use a license that has been revoked; or
- Otherwise violate any of the provisions of the Act.

A new criminal penalty was created in 2012, when the Legislature passed House Bill 7049. The bill, which contained a variety of provisions designed to enhance Florida's human trafficking laws, attempted to curb illegal activity in massage establishments by creating s. 480.0535, F.S. The statute makes it a second degree misdemeanor<sup>18</sup> if a person operating a massage establishment cannot:

- Immediately present, upon the request of a DOH investigator or a law enforcement officer:
  - Valid government identification while in the establishment; and
  - A copy of specified documentation for each employee and any person performing massage in the establishment.
- Ensure that each employee and any person performing massage in the massage establishment is able to immediately present, upon the request of a DOH investigator or a law enforcement officer, valid government identification while in the establishment.<sup>19</sup>

<sup>11</sup> Or the provisions of s. 456.072(1), F.S., which contains general grounds for discipline for those in health professions.

<sup>12</sup> Sections 480.046(2) and 456.072(2), F.S.

<sup>13</sup> Section 480.046(3), F.S.

<sup>14</sup> Rule 64B7-30.002, F.A.C.

<sup>15</sup> The disciplinary guidelines also apply when the Board finds that an applicant or licensee as committed an act set forth in s. 480.0485, F.S. (relating to sexual misconduct); s. 480.047, F.S. (setting forth prohibited acts subject to criminal penalties); and s. 456.072, F.S. (containing general grounds for discipline for those in health professions). See Rule 64B7-30.002, F.A.C.

<sup>16</sup> Disciplinary proceedings must be conducted in accordance with ch. 120, F.S. Section 480.046(4), F.S.

<sup>17</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>18</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

<sup>19</sup> Section 480.0535(3), F.S. Subsequent violations of the statute are subject to increased penalties.

Despite the Act's numerous administrative and criminal penalties, recent news reports indicate that some massage establishments continue to engage in illegal activity.<sup>20</sup>

#### Effect of the Bill

The bill creates s. 480.0475, F.S., entitled "Massage establishments; prohibited practices," and provides the following legislative intent language:

The Legislature recognizes that while the majority of massage establishments are operated by law-abiding citizens, a small number of these establishments are operated by persons who use the establishment as a place to engage in illegal activities, such as human trafficking and prostitution. It is the intent of the Legislature to protect the public and the state's massage profession and reputation from persons operating massage establishments that are engaged in illegal activity. It is also the intent of the Legislature that the perpetrators of human trafficking be penalized for their illegal conduct and that the victims of trafficking be protected and assisted by this state and its agencies.

The bill makes it a first degree misdemeanor for:

- A person to operate a massage establishment between the hours of 10:00 p.m. and 6:00 a.m.; or
- A person operating a massage establishment to use or permit such establishment to be used as a principle domicile unless the establishment is zoned for residential use under local ordinance.

A third or subsequent violation of the above-described provisions is a third degree felony.<sup>21</sup>

The prohibition relating to operating hours does not apply to massage establishments:

- Located on the premises of a health care facility as defined in s. 408.07, F.S.; or a hotel, motel, or a bed and breakfast inn, as those terms are defined in s. 509.242, F.S.; or
- In which every massage performed between the hours of 10:00 p.m. and 6:00 a.m. are performed by a massage therapist acting under the direction of a physician or physician assistant licensed under ch. 458, F.S.; an osteopathic physician or physician assistant licensed under ch. 459, F.S.; a chiropractic physician licensed under ch. 460, F.S.; a podiatric physician licensed under ch. 461, F.S.; an advanced registered nurse practitioner licensed under part I of ch. 464, F.S.; or a dentist licensed under ch. 466, F.S.

Because any violation of the Act is grounds for disciplinary action, the two new prohibitions created by the bill now constitute grounds for administrative disciplinary action by the Board.

#### **Public Nuisances**

Section 823.05, F.S., deems certain places public nuisances. For example, subsection (1) of the statute currently specifies that a person is guilty of maintaining a nuisance if they erect, establish, continue, maintain, own or lease any:

- Building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in s. 823.01, F.S.;
- House or place of prostitution, assignation, or lewdness;
- Place or building where games of chance are engaged in violation of law; or
- Place where any law of the state is violated.

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<sup>20</sup> See, e.g., "FBI raiding 'body-rub' joints in booming South Florida massage industry" [http://articles.sun-sentinel.com/2012-11-24/news/fl-fbi-massage-raids-20121124\\_1\\_massage-parlors-massage-businesses-massage-therapist](http://articles.sun-sentinel.com/2012-11-24/news/fl-fbi-massage-raids-20121124_1_massage-parlors-massage-businesses-massage-therapist) (last visited on January 9, 2013), and "3 arrested at massage parlor" <http://www.newsherald.com/news/crime-public-safety/3-arrested-at-massage-parlor-1.31152> (last visited on January 9, 2013).

<sup>21</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

The statute declares such buildings, places, tents, or booths and the furniture, fixtures, and contents a nuisance. Subsection (2) of the statute declares places used on two or more occasions by a criminal gang, criminal gang members, or criminal gang associates for the purpose of engaging in criminal gang-related activity a nuisance.

Nuisances described in s. 823.05, F.S., must be abated and enjoined pursuant to ss. 60.05 and 60.06, F.S. Section 60.05, F.S., authorizes the Attorney General, state attorney, city attorney, county attorney, and any citizen to sue in the name of the state to enjoin the nuisance, the person(s) maintaining it, and the owner or agent of the building or ground on which the nuisance exists. The court, based on evidence<sup>22</sup> or affidavit, may issue a temporary injunction enjoining:

- The maintaining of a nuisance;
- The operating and maintaining of the place or premises where the nuisance is maintained;
- The owner or agent of the building or ground upon which the nuisance exists; and
- The conduct, operation, or maintenance of any business or activity operated or maintained in the building or on the premises in connection with the maintenance of the nuisance.<sup>23</sup>

The injunction must specify the activities enjoined and must not preclude the operation of any lawful business not conducive to the maintenance of the alleged nuisance.<sup>24</sup> If the existence of a nuisance is shown at the final hearing, the court must issue a permanent injunction.<sup>25</sup>

Section 60.06, F.S., requires the court, upon proper proof, to order the abatement of nuisances mentioned in s. 823.05, F.S., and authorizes the court to enforce injunctions by contempt.

#### Effect of the Bill

The bill amends s. 823.05, F.S., to declare massage establishments that operate in violation of s. 480.0475, F.S. (the newly created operating hours and domicile prohibitions), and s. 480.0535(2), F.S. (which requires massage establishment operators to provide identification upon request of a law enforcement officer), a nuisance that may be abated or enjoined as provided in ss. 60.05 and 60.06, F.S.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 480.047, F.S., relating to penalties.

Section 2. Creates s. 480.0475, F.S., relating to massage establishments; prohibited practices.

Section 3. Amends s. 823.05, F.S., relating to places and groups engaged in criminal gang-related activity declared a nuisance; may be abated and enjoined.

Section 4. Provides an effective date of October 1, 2013.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

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<sup>22</sup> Evidence of the general reputation of the alleged nuisance and place is admissible to prove the existence of a nuisance. Section 60.05(3), F.S.

<sup>23</sup> Section 60.05(2), F.S.

<sup>24</sup> Section 60.05(2), F.S. At least 3 days' notice in writing shall be given defendant of the time and place of application for the temporary injunction.

<sup>25</sup> Section 60.05(4), F.S.

2. Expenditures:

The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of this bill. However, because third or subsequent violations of the bill are third degree felonies, it may have a negative prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill creates two new first degree misdemeanor offenses relating to massage establishments. This may have a negative jail bed impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Massage establishments will no longer be permitted to operate between the hours of 10:00 p.m. and 6:00 a.m., nor will such establishments be able to be used as a principle domicile unless zoned as such by local ordinance.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Board will likely amend their rules to establish disciplinary guidelines applicable to the prohibitions created by the bill. However, because the Board currently has broad authority to adopt rules to implement the provisions of the Act, no additional rulemaking authority is necessary.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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A bill to be entitled  
An act relating to massage establishments; amending s.  
480.047, F.S.; revising penalty provisions; creating  
s. 480.0475, F.S.; providing legislative intent;  
prohibiting the operation of a massage establishment  
between certain hours; providing exceptions;  
prohibiting the use of a massage establishment as a  
principal domicile; providing penalties; amending s.  
823.05, F.S.; providing that a massage establishment  
operating in violation of specified provisions is a  
nuisance that may be abated or enjoined; providing an  
effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 480.047, Florida Statutes, is amended  
to read:

480.047 Penalties.—

(1) It is unlawful for any person to:

(a) Hold himself or herself out as a massage therapist or  
to practice massage unless duly licensed under this chapter or  
unless otherwise specifically exempted from licensure under this  
chapter.

(b) Operate any massage establishment unless it has been  
duly licensed as provided herein, except that nothing herein  
shall be construed to prevent the teaching of massage in this  
state at a board-approved massage school.

(c) Permit an employed person to practice massage unless

29 | duly licensed as provided herein.

30 |       (d) Present as his or her own the license of another.

31 |       (e) Allow the use of his or her license by an unlicensed  
32 | person.

33 |       (f) Give false or forged evidence to the department in  
34 | obtaining any license provided for herein.

35 |       (g) Falsely impersonate any other licenseholder of like or  
36 | different name.

37 |       (h) Use or attempt to use a license that has been revoked.

38 |       (i) Otherwise violate any of the provisions of this act.

39 |       (2) Except as otherwise provided in this chapter, any ~~Any~~  
40 | person violating the provisions of this section is guilty of a  
41 | misdemeanor of the first degree, punishable as provided in s.  
42 | 775.082 or s. 775.083.

43 |       Section 2. Section 480.0475, Florida Statutes, is created  
44 | to read:

45 |       480.0475 Massage establishments; prohibited practices.-

46 |       (1) The Legislature recognizes that the while the majority  
47 | of massage establishments are operated by law-abiding citizens,  
48 | a small number of these establishments are operated by persons  
49 | who use the establishment as a place to engage in illegal  
50 | activities, such as human trafficking and prostitution. It is  
51 | the intent of the Legislature to protect the public and the  
52 | state's massage profession and reputation from persons operating  
53 | massage establishments that are engaged in illegal activity. It  
54 | is also the intent of the Legislature that the perpetrators of  
55 | human trafficking be penalized for their illegal conduct and  
56 | that the victims of trafficking be protected and assisted by

57 this state and its agencies.

58 (2) No person may operate a massage establishment between  
59 the hours of 10:00 p.m. and 6:00 a.m. This subsection does not  
60 apply to a massage establishment:

61 (a) Located on the premises of a health care facility as  
62 defined in s. 408.07; or a hotel, motel, or a bed and breakfast  
63 inn, as those terms are defined in s. 509.242; and

64 (b) In which every massage performed between the hours of  
65 10:00 p.m. and 6:00 a.m. are performed by a massage therapist  
66 acting under the direction of a physician or physician assistant  
67 licensed under chapter 458; an osteopathic physician or  
68 physician assistant licensed under chapter 459; a chiropractic  
69 physician licensed under chapter 460; a podiatric physician  
70 licensed under chapter 461; an advanced registered nurse  
71 practitioner, licensed under part I of chapter 464; or a dentist  
72 licensed under chapter 466.

73 (3) No person operating a massage establishment may use or  
74 permit such establishment to be used as a principal domicile,  
75 unless the establishment is zoned for residential use under  
76 local ordinance.

77 (4) Any person violating the provisions of this section  
78 commits a misdemeanor of the first degree, punishable as  
79 provided in s. 775.082 or s. 775.083. A third or subsequent  
80 violation of this section is a felony of the third degree,  
81 punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

82 Section 3. Section 823.05, Florida Statutes, is amended to  
83 read:

84 823.05 ~~Places and groups engaged in criminal gang-related~~

85 ~~activity~~ declared a nuisance; may be abated and enjoined.-  
 86 (1) Whoever shall erect, establish, continue, or maintain,  
 87 own or lease any building, booth, tent or place which tends to  
 88 annoy the community or injure the health of the community, or  
 89 become manifestly injurious to the morals or manners of the  
 90 people as described in s. 823.01, or any house or place of  
 91 prostitution, assignation, lewdness or place or building where  
 92 games of chance are engaged in violation of law or any place  
 93 where any law of the state is violated, shall be deemed guilty  
 94 of maintaining a nuisance, and the building, erection, place,  
 95 tent or booth and the furniture, fixtures, and contents are  
 96 declared a nuisance. All such places or persons shall be abated  
 97 or enjoined as provided in ss. 60.05 and 60.06.  
 98 (2)(a) As used in this subsection, the terms "criminal  
 99 gang," "criminal gang member," "criminal gang associate," and  
 100 "criminal gang-related activity" have the same meanings as  
 101 provided in s. 874.03.  
 102 (b) A criminal gang, criminal gang member, or criminal  
 103 gang associate who engages in the commission of criminal gang-  
 104 related activity is a public nuisance. Any and all such persons  
 105 shall be abated or enjoined as provided in ss. 60.05 and 60.06.  
 106 (c) The use of a location on two or more occasions by a  
 107 criminal gang, criminal gang members, or criminal gang  
 108 associates for the purpose of engaging in criminal gang-related  
 109 activity is a public nuisance. Such use of a location as a  
 110 public nuisance shall be abated or enjoined as provided in ss.  
 111 60.05 and 60.06.  
 112 (d) Nothing in this subsection shall prevent a local



113 governing body from adopting and enforcing laws consistent with  
 114 this chapter relating to criminal gangs and gang violence. Where  
 115 local laws duplicate or supplement this chapter, this chapter  
 116 shall be construed as providing alternative remedies and not as  
 117 preempting the field.

118 (e) The state, through the Department of Legal Affairs or  
 119 any state attorney, or any of the state's agencies,  
 120 instrumentalities, subdivisions, or municipalities having  
 121 jurisdiction over conduct in violation of a provision of this  
 122 chapter may institute civil proceedings under this subsection.  
 123 In any action brought under this subsection, the circuit court  
 124 shall proceed as soon as practicable to the hearing and  
 125 determination. Pending final determination, the circuit court  
 126 may at any time enter such injunctions, prohibitions, or  
 127 restraining orders, or take such actions, including the  
 128 acceptance of satisfactory performance bonds, as the court may  
 129 deem proper.

130 (3) A massage establishment, as defined in s. 480.033, that  
 131 operates in violation ss. 480.0475 or 480.0535(2), is declared a  
 132 nuisance. Such establishment may be abated or enjoined as  
 133 provided in ss. 60.05 and 60.06.

134 Section 4. This act shall take effect October 1, 2013.

COMMITTEE/SUBCOMMITTEE AMENDMENT

PCB Name: PCB CRJS 13-01 (2013)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED  (Y/N)

ADOPTED AS AMENDED  (Y/N)

ADOPTED W/O OBJECTION  (Y/N)

FAILED TO ADOPT  (Y/N)

WITHDRAWN  (Y/N)

OTHER

1 Committee/Subcommittee hearing PCB: Criminal Justice

2 Subcommittee

3 Representative Hood offered the following:

4

5 **Amendment**

6 Remove line 63 and insert:

7 inn, as those terms are defined in s. 509.242; or

8

COMMITTEE/SUBCOMMITTEE AMENDMENT

PCB Name: PCB CRJS 13-01 (2013)

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing PCB: Criminal Justice  
2 Subcommittee  
3 Representative Hood offered the following:

**Amendment**

4  
5  
6 Remove line 79 and insert:  
7 provided in s. 775.082 or s. 775.083. A second or subsequent  
8



# CRIMINAL JUSTICE SUBCOMMITTEE WORK PLAN

*"What Gets Measured Gets Done"*

## **1. Death Penalty Reform**

Of the 408 people currently on death row, 141 have been there longer than 20 years. The average stay on Death Row in Florida is nearly 14 years. Only California has more people on death row longer than Florida. Prolonged, insincere post-conviction appeals create a burden on taxpayers while denying justice to the families of victims. The Criminal Justice Subcommittee will be examining ways in which the capital post-conviction appeals process can be improved. It is anticipated that the Death Penalty Reform package will have both statutory and constitutional elements.

## **2. "Smart Justice" Reforms**

In recent years, lobbying organizations have advocated for what are commonly referred to as "Smart Justice" reforms. These reforms purport to improve offender reentry efforts. However, "Smart Justice" means different things to different stakeholders. Thus, the Criminal Justice Subcommittee must determine which, if any, such reforms can reduce costs without jeopardizing public safety.

This past summer, a variety of public safety and business organizations participated in a series of meetings to discuss Smart Justice proposals. These meetings culminated in a Justice Summit in December 2012, which was attended by Chairman Gaetz and Policy Chief Katie Cunningham. The Criminal Justice Subcommittee will be carefully reviewing "Smart Justice" proposals made to the Legislature.

## **3. Stand Your Ground**

Since Trayvon Martin's tragic death, many have questioned whether Florida's "Stand Your Ground" law should be repealed or amended. In March 2012, Governor Scott created the "Task Force on Citizen Safety and Protection" whose mission was to review Chapter 776, F.S., and its implementation, listen to the concerns and ideas from Floridians, and make recommendations to the Governor and Florida Legislature to ensure the rights of all Floridians and visitors are protected. The Criminal Justice Subcommittee will be reviewing the findings of the Task Force and determining if any legislation is needed to enhance public safety.

## **4. Sex Parlors / Human Trafficking**

Florida has become a hotbed for illegitimate "massage parlors" which provide illegal sexual services and harm the legitimate massage therapy industry. The young women - who occasionally live in these sex parlors - are often vulnerable victims of human trafficking. The Criminal Justice Subcommittee will be researching ways to diminish the economic viability of illegitimate sex parlors, to provide law enforcement the tools necessary to prosecute human traffickers who operate sex parlors, and to further build on the strength of HB 7049 (2012).

## **5. Synthetic Drugs**

Despite the Legislature twice passing legislation outlawing various synthetic drug compounds, foreign and domestic manufacturers continue to develop synthetic drug formulas faster than the Legislature can ban them. The Criminal Justice Subcommittee will be researching whether there is a more efficient and effective way to regulate synthetic drugs.

## 6. Criminal Gang Prevention

Gang violence is on the rise in pockets of Florida. The Criminal Justice Subcommittee will be researching ways to curtail gang recruitment and activity and empower prosecutors to effectively prosecute gang activity.

## 7. Animal Cruelty

Judges are interpreting animal cruelty statutes to conflate multiple acts of animal cruelty into one sole act. This renders prosecution functionally meaningless given the low punishments for one sole act of cruelty. The Criminal Justice Subcommittee will attempt to clarify animal cruelty statutes to allow prosecutors to prosecute multiple violations of animal cruelty statutes.

## 8. Sex Offender Legislation

A certain court recently held that the language of s. 943.04354(1), F.S., was ambiguous. Last year, the Florida House unanimously passed legislation (HB 7047) that clarified the statute and that brought Florida in better compliance with the federal Adam Walsh Act. However, this legislation died in the Senate. The Criminal Justice Subcommittee will revisit this legislation and work with the Florida Department of Law Enforcement to determine whether other statutory changes are needed to further comply with the federal Adam Walsh Act.

## 9. Habitual Offender Bonds

Florida's "career criminal" statutes allow for enhanced penalties for defendants with specified criminal histories. It has been reported that defendants who have met or meet the criteria for being deemed a "career criminal" are released on low bond amounts because the judge is unaware of the defendant's criminal history. The Criminal Justice Subcommittee will research ways to ensure that career criminals are held until judges, prosecutors, and defense attorneys are given the time needed to set an appropriate bond amount (if any).

## 10. *Graham* and *Miller* – Juvenile Sentencing

### *Graham* Decision

In 2010, the United States Supreme Court held in *Graham v. Florida* that the 8th Amendment of the U.S. Constitution prohibits states from sentencing juvenile non-homicide offenders to life imprisonment without providing a meaningful opportunity to obtain release. The court requested states "to explore the means and mechanisms for compliance" with the decision.

### *Miller* Decision

On June 25, 2012, the U.S. Supreme Court held in *Miller v. Alabama* that the 8th Amendment forbids a sentencing scheme that *mandates* life in prison without the possibility of parole for juvenile offenders. The Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions" and requires that punishments be proportionate to the crime committed. In this case the Court determined that proportionality must take into account "the mitigating qualities of youth."

The Criminal Justice Subcommittee will be monitoring legislation filed that addresses these decisions.

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