

Chapter 6

DRUG OFFENSES

SYNOPSIS

- § 6.1. **PRIMARY CHECKLIST FOR DEFENSE**
- § 6.2. **APPLICABLE STATUTES**
- § 6.3. **POSSESSION**
 - A. Elements — General
 - 1. Statutory References
 - 2. Control
 - 3. Mens Rea—Scienter
 - B. Constructive Possession
 - 1. Generally
 - 2. Exclusive Possession
 - 3. Joint Possession
 - 4. Non-Exclusive Possession
 - 5. Conspirators
 - C. Proximity Problem
 - D. Procedure and Practice
 - E. Attempted Possession.
 - F. Obtaining A Controlled Substance By Misrepresentation, Fraud, Forgery, Deception or Subterfuge.
 - G. Possess With Intent To Sell, Purchase, Manufacture Or Deliver
 - H. Defenses
- § 6.4. **DELIVERY (SALE)**
 - A. Nature Of Delivery
 - B. Separate Offenses
 - C. Attempted Delivery (Sale)
 - D. Selling Substituted Or Counterfeit Substances
 - E. Delivery by a Person 18 or Older to a Person Under 18; or Using a Person Under 18 as an Agent
 - F. Selling, Purchasing, Manufacturing, Delivering, or Possessing for Such Purposes, Within 1,000 Feet of a School
- § 6.5. **PARAPHERNALIA OFFENSES**
- § 6.6. **PROOF OF SUBSTANCE**

6-2

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.1

- A. Burden of Proof
- B. Constitutionality
- C. Charge

§ 6.7. **TRAFFICKING**§ 6.8. **FORFEITURES**

- A. General
- B. Procedure

§ 6.9. **RICO (Racketeer Influenced and Corrupt Organization)**§ 6.10. **FORGED PRESCRIPTIONS**

- A. Scierter
- B. Problems of Proof
- C. Good Faith
- D. Administrative Searches and Seizures
- E. Miscellaneous
- F. Sale of Prescription Drugs Without a Prescription

§ 6.11. **PENALTIES**

- A. D. [*Reserved for Future Material*]
- E. Sentencing Problems
- F. Minimum Mandatory Sentences
- G. Civil Action
- H. Revocation of Driver's License

§ 6.12. **LESSER INCLUDED OFFENSES**

- A. Offenses Necessarily Included in the Offense Charged, Which Will Include Some Lesser Degrees of Offenses.
- B. Offenses Which May or May Not Be Included in the Offense Charged, Depending on the Accusatory Pleading and the Evidence, Which Will Include All Attempts and Some Lesser Degrees of Offenses.
- C. Exceptions
 1. Waiver
 2. Offense Is Two-Steps Removed
 3. Offenses Punished Identically

§ 6.13. **SEARCH AND SEIZURE**§ 6.14. **PROBABLE CAUSE**§ 6.15. **JURY INSTRUCTIONS**§ 6.16. **RELATED STATUTES**§ 6.1. **PRIMARY CHECKLIST FOR DEFENSE**

- A. Jurisdiction
- B. Venue

§ 6.2

DRUG OFFENSES

6-3

- C. Arrest (*See* Volume 1)
- D. Search and Seizure (*See* Volume 1)
- E. Line-Up (*See* Volume A)
- F. Informant Disclosure (*See* Volume 1, Search and Seizure)
- G. Entrapment (*See* § VII, D, and Volume 1 Arrest)
- H. Miranda Warnings (*See* Volume 1A)
 - 1. Admissibility of Confession (*See* Miranda Warnings)
- J. Former Jeopardy
- K. Elements
 - 1. Possession
 - 2. Sale or Delivery
 - 3. Other
- L. Scientific Tests or Identification (*See below* § VI)
- M. Exceptions and Exemptions (*See below* § VI)
- N. Exclusions (*See below* § VI)
- O. Jury Instructions (*See below* §§ XII and XV)
- P. Constitutionality (*See below* § VI, B)

§ 6.2. APPLICABLE STATUTES*

322.055 Revocation or suspension of, or delay of eligibility for, driver's license for persons 18 years of age or older convicted of certain drug offenses.

(1) Notwithstanding the provisions of s. 322.28, upon the conviction of a person 18 years of age or older for possession or sale of, trafficking in, or conspiracy to possess, sell, or traffic in a controlled substance, the court shall direct the department to revoke the driver's license or driving privilege of the person. The period of such revocation shall be 2 years or until the person is evaluated for and, if deemed necessary by the evaluating agency, completes

* *The Florida Contraband Forfeiture Act has been transferred from Chapter 943 of the statutes to Chapter 932; the "Rico" Act has been transferred from Chapter 943 to Chapter 895.*

a drug treatment and rehabilitation program approved or regulated by the Department of Children and Family Services. However, the court may, in its sound discretion, direct the department to issue a license for driving privileges restricted to business or employment purposes only, as defined by s. 322.271, if the person is otherwise qualified for such a license. A driver whose license or driving privilege has been suspended or revoked under this section or s. 322.056 may, upon the expiration of 6 months, petition the department for restoration of the driving privilege on a restricted or unrestricted basis depending on length of suspension or revocation. In no case shall a restricted license be available until 6 months of the suspension or revocation period has expired.

(2) If a person 18 years of age or older is convicted for the possession or sale of, trafficking in, or conspiracy to possess, sell, or traffic in a controlled substance and such person is eligible by reason of age for a driver's license or privilege, the court shall direct the department to withhold issuance of such person's driver's license or driving privilege for a period of 2 years after the date the person was convicted or until the person is evaluated for and, if deemed necessary by the evaluating agency, completes a drug treatment and rehabilitation program approved or regulated by the Department of Children and Family Services. However, the court may, in its sound discretion, direct the department to issue a license for driving privileges restricted to business or employment purposes only, as defined by s. 322.271, if the person is otherwise qualified for such a license. A driver whose license or driving privilege has been suspended or revoked under this section or s. 322.056 may, upon the expiration of 6 months, petition the department for restoration of the driving privilege on a restricted or unrestricted basis depending on the length of suspension or revocation. In no case shall a restricted license be available until 6 months of the suspension or revocation period has expired.

(3) If a person 18 years of age or older is convicted for the possession or sale of, trafficking in, or conspiracy to possess, sell, or traffic in a controlled substance and such person's driver's license or driving privilege is already under suspension or revocation for any reason, the court shall direct the department to extend the period of such suspension or revocation by an additional period of 2 years

§ 6.2

DRUG OFFENSES

6-5

or until the person is evaluated for and, if deemed necessary by the evaluating agency, completes a drug treatment and rehabilitation program approved or regulated by the Department of Children and Family Services. However, the court may, in its sound discretion, direct the department to issue a license for driving privileges restricted to business or employment purposes only, as defined by s. 322.271, if the person is otherwise qualified for such a license. A driver whose license or driving privilege has been suspended or revoked under this section or s. 322.056 may, upon the expiration of 6 months, petition the department for restoration of the driving privilege on a restricted or unrestricted basis depending on the length of suspension or revocation. In no case shall a restricted license be available until 6 months of the suspension or revocation period has expired.

(4) If a person 18 years of age or older is convicted for the possession or sale of, trafficking in, or conspiracy to possess, sell, or traffic in a controlled substance and such person is ineligible by reason of age for a driver's license or driving privilege, the court shall direct the department to withhold issuance of such person's driver's license or driving privilege for a period of 2 years after the date that he or she would otherwise have become eligible or until he or she becomes eligible by reason of age for a driver's license and is evaluated for and, if deemed necessary by the evaluating agency, completes a drug treatment and rehabilitation program approved or regulated by the Department of Children and Family Services. However, the court may, in its sound discretion, direct the department to issue a license for driving privileges restricted to business or employment purposes only, as defined by s. 322.271, if the person is otherwise qualified for such a license. A driver whose license or driving privilege has been suspended or revoked under this section or s. 322.056 may, upon the expiration of 6 months, petition the department for restoration of the driving privilege on a restricted or unrestricted basis depending on the length of suspension or revocation. In no case shall a restricted license be available until 6 months of the suspension or revocation period has expired.

(5) Each clerk of court shall promptly report to the department each conviction for the possession or sale of, trafficking in, or conspiracy to possess, sell, or traffic in a controlled substance.

History.—s. 12, ch. 87-243; s. 4, ch. 89-281; s. 7, ch. 90-265; s. 74, ch. 94-306; s. 928, ch. 95-148; s. 60, ch. 99-8; s. 281, ch. 99-248.

329.10 Aircraft registration.

(1) It is unlawful for any person in this state to knowingly have in his or her possession an aircraft that is not registered in accordance with the regulations of the Federal Aviation Administration contained in Title 14, chapter 1, parts 47–49 of the Code of Federal Regulations.

(2) Any aircraft in or operated in this state that is found to be registered to a nonexistent person, firm, or corporation or to a firm, business, or corporation which is no longer a legal entity is in violation of this section. Any firm, business, or corporation that has no physical location or corporate officers or that has lapsed into an inactive state or been dissolved by order of the Secretary of State for a period of at least 90 days with no documented attempt to reinstate the firm, business, or corporation or to register its aircraft in the name of a real person or legal entity in accordance with Federal Aviation Administration regulations is in violation of this section.

(3) A person who knowingly supplies false information to a governmental entity in regard to the name, address, business name, or business address of the owner of an aircraft in or operated in the state is in violation of this section.

(4) It is a violation of this section for any person or corporate entity to knowingly supply false information to any governmental entity in regard to ownership by it or another firm, business, or corporation of an aircraft in or operated in this state if it is determined that such corporate entity or other firm, business, or corporation:

(a) Is not, or has never been, a legal entity in this state;

(b) Is not, or has never been, a legal entity in any other state;
or

(c) Has lapsed into a state of no longer being a legal entity in this state as defined in chapter 607 or s. 865.09, and no documented attempt has been made to correct such information

§ 6.2

DRUG OFFENSES

6-7

with the governmental entity for a period of 90 days after the date on which such lapse took effect with the Secretary of State.

(5) This section does not apply to any aircraft registration or information supplied by a governmental entity in the course and scope of performing its lawful duties.

(6)(a) A violation of this section shall be deemed a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any violation of this section shall constitute the aircraft to which it relates as contraband, and said aircraft may be seized as contraband by a law enforcement agency and shall be subject to forfeiture pursuant to ss. 932.701–932.704.

History.—s. 5, ch. 83-272; s. 2, ch. 84-259; s. 21, ch. 87-243; s. 471, ch. 95-148.

329.11 Aircraft identification numbers; penalties.

(1)(a) It is unlawful for any person, firm, association, or corporation to knowingly buy, sell, offer for sale, receive, dispose of, conceal, or have in his or her possession, or to endeavor to buy, sell, offer for sale, receive, dispose of, conceal, or possess, any aircraft or part thereof on which the assigned identification numbers do not meet the requirements of the federal aviation regulations.

(b) If any of the identification numbers required by this subsection have been knowingly omitted, altered, removed, destroyed, covered, or defaced, or the real identity of the aircraft cannot be determined due to an intentional act of the owner or possessor, the aircraft may be seized as contraband property by a law enforcement agency and shall be subject to forfeiture pursuant to ss. 932.701–932.704. Such aircraft may not be knowingly sold or operated from any airport, landing field, or other property or body of water where aircraft may land or take off in this state unless the Federal Aviation Administration has issued the aircraft a replacement identification number which shall thereafter be used for identification purposes.

(c) It is unlawful for any person to knowingly possess, manufacture, sell or exchange, offer to sell or exchange, supply

in blank, or give away any counterfeit manufacturer's aircraft identification number plate or decal used for the purpose of identification of any aircraft; to authorize, direct, aid in exchange, or give away such counterfeit manufacturer's aircraft identification number plate or decal; or to conspire to do any of the foregoing.

(d) Any person who violates any provision of this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) The failure to have aircraft identification numbers clearly displayed on the aircraft and in compliance with federal aviation regulations is probable cause for any law enforcement officer in this state to make further inspection of the aircraft in question to ascertain its true identity. A law enforcement officer is authorized to inspect an aircraft for identification numbers:

(a) When it is located on public property; or

(b) Upon consent of the owner of the private property on which the aircraft is stored.

History.—s. 3, ch. 83-272; s. 23, ch. 87-243; s. 33, ch. 91-221; s. 472, ch. 95-148.

817.563 Controlled substance named or described in s. 893.03; sale of substance in lieu thereof.

It is unlawful for any person to agree, consent, or in any manner offer to unlawfully sell to any person a controlled substance named or described in s. 893.03 and then sell to such person any other substance in lieu of such controlled substance. Any person who violates this section with respect to:

(1) A controlled substance named or described in s. 893.03(1), (2), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) A controlled substance named or described in s. 893.03(5) is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

History.—s. 1, ch. 81-53; s. 4, ch. 89-281; s. 101, ch. 97-264; s.7, ch. 99-186; s. 17, ch. 2000-320.

817.564 Imitation controlled substances defined; possession and distribution prohibited.

(1) For the purposes of this section, the term “imitation controlled substance” means a pill, capsule, tablet, or substance in any form whatsoever which is not a controlled substance enumerated in chapter 893, which is subject to abuse, and which:

(a) By overall dosage unit appearance, including color, shape, size, markings, and packaging, or by representations made, would cause the likelihood that such a pill, capsule, tablet, or substance will be mistaken for a controlled substance unless such substance was introduced into commerce prior to the initial introduction into commerce of the controlled substance which it is alleged to imitate; or

(b) By express or implied representations, purports to act like a controlled substance as a stimulant or depressant of the central nervous system and which is not commonly used or recognized for use in that particular formulation for any purpose other than for such stimulant or depressant effect, unless marketed, promoted, or sold as permitted by the United States Food and Drug Administration.

(2) In those instances where the appearance of the dosage unit is not reasonably sufficient to establish that the substance is an imitation controlled substance, the court or authority concerned may consider, in addition to all other logically relevant factors, the following factors as related to “representations made” in determining whether the substance is an imitation controlled substance:

(a) Statements made by an owner or by anyone else in control of the substance concerning the nature of the substance or its use or effect.

(b) Statements made to the recipient that the substance may be resold for inordinate profit.

(c) Whether the substance is packaged in a manner normally used for illicit controlled substances.

(d) Evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities.

6–10

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

(e) Prior convictions, if any, of an owner, or anyone in control of the object, under state or federal law related to controlled substances or fraud.

(f) The proximity of the substances to controlled substances.

(3) It is unlawful for any person to manufacture, distribute, sell, give, or possess with the intent to manufacture, distribute, sell, or give an imitation controlled substance. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) It is unlawful for any person 18 years of age or over to knowingly sell or distribute an imitation controlled substance to a person under the age of 18 years. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication or to post or distribute in any public place any advertisement or solicitation with reasonable knowledge that the purpose of the advertisement or solicitation is to promote the distribution of imitation controlled substances. Any person who violates this subsection is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

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

History.—s. 1, ch. 85-319; s. 197, ch. 91-224.

817.565 Urine testing, fraudulent practices; penalties.

(1) It is unlawful for any person:

(a) Willfully to defraud or attempt to defraud any lawfully administered urine test designed to detect the presence of chemical substances or controlled substances.

§ 6.2

DRUG OFFENSES

6-11

(b) Willfully to manufacture, advertise, sell, or distribute any substance or device which is intended to defraud or attempt to defraud any lawfully administered urine test designed to detect the presence of chemical substances or controlled substances.

(2) Any person who violates the provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

History.—s. 9, ch. 87-243.

831.31 Counterfeit controlled substance; sale, manufacture, delivery, or possession with intent to sell, manufacture, or deliver.

(1) It is unlawful for any person to sell, manufacture, or deliver, or to possess with intent to sell, manufacture, or deliver, a counterfeit controlled substance. Any person who violates this subsection with respect to:

(a) A controlled substance named or described in s. 893.03(1), (2), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) A controlled substance named or described in s. 893.03(5) is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(2) For purposes of this section, “counterfeit controlled substance” means:

(a) A controlled substance named or described in s. 893.03 which, or the container or labeling of which, without authorization bears the trademark, trade name, or other identifying mark, imprint, or number, or any likeness thereof, of a manufacturer other than the person who in fact manufactured the controlled substance; or

(b) Any substance which is falsely identified as a controlled substance named or described in s. 893.03.

History.—s. 2, ch. 81-53; s. 4, ch. 89-281; s. 2, ch. 92-19; s. 102, ch. 97-264; s. 104, ch. 99-3; s. 8, ch. 99-186; s. 18, ch. 2000-320.

843.18 Boats; fleeing or attempting to elude a law enforcement officer.

(1) It is unlawful for the operator of any boat plying the waters of the state, having knowledge that he or she has been directed to stop such vessel by a duly authorized law enforcement officer, willfully to refuse or fail to stop in compliance with such directive or, having stopped in knowing compliance with such a directive, willfully to flee in an attempt to elude such officer. Any person violating this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Any violation of this section with respect to any vessel shall constitute such vessel as contraband which may be seized by a law enforcement agency and which shall be subject to forfeiture pursuant to ss. 932.701–932.704.

History.—s. 1, ch. 80-160; s. 1, ch. 82-210; s. 29, ch. 87-243; s. 11, ch. 87-392; s. 1347, ch. 97-102.

877.111 Inhalation, ingestion, possession, sale, purchase, or transfer of harmful chemical substances; penalties.

(1) It is unlawful for any person to inhale or ingest, or to possess with intent to breathe, inhale, or drink, any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, ethylene glycol monomethyl ether acetate, cyclohexanone, nitrous oxide, diethyl ether, alkyl nitrites (butyl nitrite), or any similar substance for the purpose of inducing a condition of intoxication or which distorts or disturbs the auditory, visual, or mental processes. This section does not apply to the possession and use of these substances as part of the care or treatment of a disease or injury by a practitioner licensed under chapter 458, chapter 459, chapter 464, or chapter 466 or to beverages controlled by the provisions of chapter 561, chapter 562, chapter 563, chapter 564, or chapter 565.

(2) It is unlawful for any person to possess, buy, sell, or otherwise transfer any chemical substance specified in subsection (1) for the purpose of inducing or aiding any other person to violate the provisions of subsection (1).

§ 6.2

DRUG OFFENSES

6–13

(3) Except as provided in subsection (4) with respect to nitrous oxide, any person who violates subsection (1) or subsection (2) commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(4) Any person who knowingly distributes, sells, purchases, transfers, or possesses more than 16 grams of nitrous oxide for any use other than:

(a) As part of the care or treatment of a disease or injury by a practitioner licensed under chapter 458, chapter 459, chapter 464, chapter 466, or chapter 474;

(b) As a food processing propellant;

(c) As a semiconductor oxidizer;

(d) As an analytical chemistry oxidizer in atomic absorption spectrometry;

(e) In the production of chemicals used to inflate airbags;

(f) As an oxidizer for chemical production, combustion, or jet propulsion; or

(g) When mixed with not less than 100 parts per million of sulfur dioxide

commits a felony of the third degree which shall be known as unlawful distribution of nitrous oxide, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, in addition to proving by any other means that nitrous oxide was knowingly possessed, distributed, sold, purchased, or transferred for any purpose not specified in paragraphs (a)-(g), proof that any person discharged or sided another in discharging, nitrous oxide to inflate a balloon or any other object suitable for subsequent inhalation creates an interference of the person's knowledge that the nitrous oxide's use was for a purpose other than those provided in paragraphs (a)-(g).

(5) Any person who violates any of the provisions of this section, may in the discretion of the trial judge, be required to participate in a substance abuse services program approved or regulated by the Department of Children and Family Services

pursuant to the provisions of chapter 397, provided the director of the program approves the placement of the defendant in the program. Such required participation may be imposed in addition to, or in lieu of, any penalty or probation otherwise prescribed by law. However, the total time of such penalty, probation and program participation shall not exceed the maximum length of sentence possible for the offense.

History.—s. 1, ch. 83-187; s. 39, ch. 93-39; s. 299, ch. 99-8; s. 1, ch. 2000-116; s. 146, ch. 2000-318.

893.01 Short title.

This chapter shall be cited and known as the “Florida Comprehensive Drug Abuse Prevention and Control Act.”

History.—s. 1, ch. 73-331.

893.02 Definitions.

The following words and phrases as used in this chapter shall have the following meanings, unless the context otherwise requires:

- (1) “Administer” means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a person or animal.
- (2) “Analog” or “chemical analog” means a structural derivative of a parent compound that is a controlled substance.
- (3) “Cannabis” means all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.
- (4) “Controlled substance” means any substance named or described in Schedules I through V of s. 893.03. Laws controlling the manufacture, distribution, preparation, dispensing, or administration of such substances are drug abuse laws.
- (5) “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

§ 6.2

DRUG OFFENSES

6–15

(6) “Dispense” means the transfer of possession of one or more doses of a medicinal drug by a pharmacist or other licensed practitioner to the ultimate consumer thereof or to one who represents that it is his or her intention not to consume or use the same but to transfer the same to the ultimate consumer or user for consumption by the ultimate consumer or user.

(7) “Distribute” means to deliver, other than by administering or dispensing, a controlled substance.

(8) “Distributor” means a person who distributes.

(9) “Department” means the Department of Health.

(10) “Hospital” means an institution for the care and treatment of the sick and injured, licensed pursuant to the provisions of chapter 395 or owned or operated by the state or Federal Government.

(11) “Laboratory” means a laboratory approved by the Drug Enforcement Administration as proper to be entrusted with the custody of controlled substances for scientific, medical, or instructional purposes or to aid law enforcement officers and prosecuting attorneys in the enforcement of this chapter.

(12) “Listed chemical” means any precursor chemical or essential chemical named or described in s. 893.033.

(13)(a) “Manufacture” means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation, compounding, packaging, or labeling of a controlled substance by:

1. A practitioner or pharmacist as an incident to his or her administering or delivering of a controlled substance in the course of his or her professional practice.

2. A practitioner, or by his or her authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis, and not for sale.

(b) “Manufacturer” means and includes every person who prepares, derives, produces, compounds, or repackages any drug as defined by the Florida Drug and Cosmetic Act. However, this definition does not apply to manufacturers of patent or proprietary preparations as defined in the Florida Pharmacy Act. Pharmacies, and pharmacists employed thereby, are specifically excluded from this definition.

(14) “Mixture” means any physical combination of two or more substances.

(15) “Patient” means an individual to whom a controlled substance is lawfully dispensed or administered pursuant to the provisions of this chapter.

(16) “Pharmacist” means a person who is licensed pursuant to chapter 465 to practice the profession of pharmacy in this state.

(17) “Possession” includes temporary possession for the purpose of verification or testing, irrespective of dominion or control.

(18) “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:

(a) Used in amounts that create a hazard to the user’s health or the safety of the community;

(b) Diverted from legal channels and distributed through illegal channels; or

(c) 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.

(19) “Practitioner” means a physician licensed pursuant to chapter 458, a dentist licensed pursuant to chapter 466, a veterinarian licensed pursuant to chapter 474, an osteopathic physician licensed

§ 6.2

DRUG OFFENSES

6-17

pursuant to chapter 459, a naturopath licensed pursuant to chapter 462, or a podiatrist licensed pursuant to chapter 461, provided such practitioner holds a valid federal controlled substance registry number.

(20) “Prescription” means and includes an order for drugs or medicinal supplies written, signed, or transmitted by word of mouth, telephone, telegram, or other means of communication by a duly licensed practitioner licensed by the laws of the state to prescribe such drugs or medicinal supplies, issued in good faith and in the course of professional practice, intended to be filled, compounded, or dispensed by another person licensed by the laws of the state to do so, and meeting the requirements of s. 893.04. The term also includes an order for drugs or medicinal supplies so transmitted or written by a physician, dentist, veterinarian, or other practitioner licensed to practice in a state other than Florida, but only if the pharmacist called upon to fill such an order determines, in the exercise of his professional judgment, that the order was issued pursuant to a valid patient-physician relationship, that it is authentic, and that the drugs or medicinal supplies so ordered are considered necessary for the continuation of treatment of a chronic or recurrent illness. However, if the physician writing the prescription is not known to the pharmacist, the pharmacist shall obtain proof to a reasonable certainty of the validity of said prescription. A prescription order for a controlled substance shall not be issued on the same prescription blank with another prescription order for a controlled substance which is named or described in a different schedule, nor shall any prescription order for a controlled substance be issued on the same prescription blank as a prescription order for a medicinal drug, as defined in ¹s. 465.031(5), which does not fall within the definition of a controlled substance as defined in this act.

(21) “Wholesaler” means any person who acts as a jobber, wholesale merchant, or broker, or an agent thereof, who sells or distributes for resale any drug as defined by the Florida Drug and Cosmetic Act. However, this definition does not apply to persons who sell only patent or proprietary preparations as defined in the Florida Pharmacy Act. Pharmacies, and pharmacists employed thereby, are specifically excluded from this definition.

History.—s. 2, ch. 73-331; s. 1, ch. 75-18; s. 470, ch. 77-147; s. 1, ch. 77-174; s. 184, ch. 79-164; s. 1, ch. 79-325; s. 37, ch. 82-225; s. 169, ch. 83-216; s. 1, ch. 85-242; s. 1, ch. 91-279; s. 1, ch. 92-19; s. 1434, ch. 97-102; s. 104, ch. 97-264; s. 234, ch. 98-166; s. 300, ch. 99-8; s. 10, ch. 99-186; s. 1, ch. 2000-320.

¹Note.—Repealed by s. 4, ch. 79-226.

893.03 Standards and schedules.

The substances enumerated in this section are controlled by this chapter. The controlled substances listed or to be listed in Schedules I, II, III, IV, and V are included by whatever official, common, usual, chemical, or trade name designated. The provisions of this section shall not be construed to include within any of the schedules contained in this section any excluded drugs listed within the purview of 21 C.F.R. s. 1308.22, styled “Excluded Substances”; 21 C.F.R. s. 1308.24, styled “Exempt Chemical Preparations”; 21 C.F.R. s. 1308.32, styled “Exempted Prescription Products”; or 21 C.F.R. s. 1308.34, styled “Exempt Anabolic Steroid Products.”

(1) SCHEDULE I.—A substance in Schedule I has a high potential for abuse and has no currently accepted medical use in treatment in the United States and in its use under medical supervision does not meet accepted safety standards. The following substances are controlled in Schedule I:

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

1. Acetyl-alpha-methylfentanyl.
2. Acetylmethadol.
3. Allylprodine.
4. Alphacetylmethadol (except levo-alphacetylmethadol, also known as levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM).
5. Alphamethadol.
6. Alpha-methylfentanyl (N-[1-(alpha-methyl-betaphenyl) ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine).

§ 6.2

DRUG OFFENSES

6–19

7. Alpha-methylthiofentanyl.
8. Alphameprodine.
9. Benzethidine.
10. Benzylfentanyl.
11. Betacetylmethadol.
12. Beta-hydroxyfentanyl.
13. Beta-hydroxy-3-methylfentanyl.
14. Betameprodine.
15. Betamethadol.
16. Betaprodine.
17. Clonitazene.
18. Dextromoramide.
19. Diampromide.
20. Diethylthiambutene.
21. Difenoxin.
22. Dimenoxadol.
23. Dimepheptanol.
24. Dimethylthiambutene.
25. Dioxaphetyl butyrate.
26. Dipipanone.
27. Ethylmethylthiambutene.
28. Etonitazene.
29. Etoxidine.
30. Flunitrazepam.
31. Furethidine.
32. Hydroxypethidine.
33. Ketobemidone.
34. Levomoramide.
35. Levophenacymorphan.
36. 1-Methyl-4-Phenyl-4-Propionoxypiperidine (MPPP).

6–20 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.2

37. 3-Methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropan amide).
38. 3-Methylthiofentanyl.
39. 3, 4-Methylenedioxymethamphetamine (MDMA).
40. Morpheridine.
41. Noracymethadol.
42. Norlevorphanol.
43. Normethadone.
44. Norpipanone.
45. Para-Fluorofentanyl.
46. Phenadoxone.
47. Phenampromide.
48. Phenomorphan.
49. Phenoperidine.
50. 1-(2-Phenylethyl)-4-Phenyl-4-Acetyloxypiperidine (PEPAP).
51. Pir tramide.
52. Proheptazine.
53. Properidine.
54. Propiram.
55. Racemoramide.
56. Thenylfentanyl.
57. Thiofentanyl.
58. Tilidine.
59. Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following substances, their salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Acetorphine.
2. Acetyldihydrocodeine.

§ 6.2

DRUG OFFENSES

6-21

3. Benzylmorphine.
4. Codeine methylbromide.
5. Codeine-N-Oxide.
6. Cyprenorphine.
7. Desomorphine.
8. Dihydromorphine.
9. Drotebanol.
10. Etorphine (except hydrochloride salt).
11. Heroin.
12. Hydromorphanol.
13. Methyldesorphine.
14. Methyldihydromorphine.
15. Monoacetylmorphine.
16. Morphine methylbromide.
17. Morphine methylsulfonate.
18. Morphine-N-Oxide.
19. Myrophine.
20. Nicocodine.
21. Nicomorphine.
22. Normorphine.
23. Pholcodine.
24. Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances or which contains any of their salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Alpha-ethyltryptamine.
2. 2-Amino-4-methyl-5-phenyl-2-oxazoline (4-methylaminorex).
3. 2-Amino-5-phenyl-2-oxazoline (Aminorex).

6–22 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.2

4. 4-Bromo-2,5-dimethoxyamphetamine.
5. 4-Bromo-2, 5-dimethoxyphenethylamine.
6. Bufotenine.
7. Cannabis.
8. Cathinone.
9. Dimethyltryptamine.
10. 2,5-Dimethoxyamphetamine.
11. 2,5-Dimethoxy-4-ethylamphetamine (DOET).
12. Dimethyltryptamine.
13. N-Ethyl-1-phenylcyclohexylamine (PCE) (Ethylamine analog of phencyclidine).
14. N-Ethyl-3-piperidyl benzilate.
15. N-ethylamphetamine.
16. Fenethylamine.
17. N-Hydroxy-3,4-methylenedioxyamphetamine.
18. Ibogaine.
19. Lysergic acid diethylamide (LSD).
20. Mescaline.
21. Methcathinone.
22. 5-Methoxy-3,4-methylenedioxyamphetamine.
23. 4-methoxyamphetamine.
24. 4-methoxymethamphetamine.
25. 4-Methyl-2,5-dimethoxyamphetamine.
26. 3,4-Methylenedioxy-N-ethylamphetamine.
27. 3,4-Methylenedioxyamphetamine.
28. N-Methyl-3-piperidyl benzilate.
29. N,N-dimethylamphetamine.
30. Parahexyl.
31. Peyote.
32. N-(1-Phenylcyclohexyl)-pyrrolidine (PCPY) (Pyrrolidine analog of phencyclidine).

§ 6.2

DRUG OFFENSES

6–23

33. Psilocybin.
34. Psilocyn.
35. Tetrahydrocannabinols.
36. 1-[1-(2-Thienyl)-cyclohexyl]-piperidine (TCP) (Thiophene analog of phencyclidine).
37. 3,4,5-Trimethoxyamphetamine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including any of its salts, isomers, optical isomers, salts of their isomers, and salts of these optical isomers whenever the existence of such isomers and salts is possible within the specific chemical designation:

1. 1, 4-Butanediol.
2. Gamma-butyrolactone (GBL).
3. Gamma-hydroxybutyric (GHB).
4. Methaqualone.
5. Mecloqualone.

(2) SCHEDULE II.—A substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence. The following substances are controlled in Schedule II:

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis:

1. Opium and any salt, compound, derivative, or preparation of opium, except nalmefene or isoquinoline alkaloids of opium, including, but not limited to the following:
 - a. Raw opium.
 - b. Opium extracts.

6–24 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.2

- c. Opium fluid extracts.
- d. Powdered opium.
- e. Granulated opium.
- f. Tincture of opium.
- g. Codeine.
- h. Ethylmorphine.
- i. Etorphine hydrochloride.
- j. Hydrocodone.
- k. Hydromorphone.
- l. Levo-alphaacetylmethadol (also known as levo-alphaacetylmethadol, levomethadyl acetate, or LAAM).
- m. Metopon (methyldihydromorphinone).
- n. Morphine.
- o. Oxycodone.
- p. Oxymorphone.
- q. Thebaine.

2. Any salt, compound, derivative, or preparation of a substance which is chemically equivalent to or identical with any of the substances referred to in subparagraph 1., except that these substances shall not include the isoquinoline alkaloids of opium.

3. Any part of the plant of the species *Papaver somniferum*, L.

4. Cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following substances, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

- 1. Alfentanil.

§ 6.2

DRUG OFFENSES

6-25

2. Alphaprodine.
3. Anileridine.
4. Bezitramide.
5. Bulk propoxyphene (nondosage forms).
6. Carfentanil.
7. Dihydrocodeine.
8. Diphenoxylate.
9. Fentanyl.
10. Isomethadone.
11. Levomethorphan.
12. Levorphanol.
13. Metazocine.
14. Methadone.
15. Methadone-Intermediate,4-cyano-2-dimethylamino-4,4-diphenylbutane.
16. Moramide-Intermediate,2-methyl-3-morpholino-1,1-diphenylpropanecarboxylic acid.
17. Nabilone.
18. Pethidine (meperidine).
19. Pethidine-Intermediate-A,4-cyano-1-methyl-4-phenylpiperidine.
20. Pethidine-Intermediate-B,ethyl-4-phenylpiperidine-4-carboxylate.
21. Pethidine-Intermediate-C,1-methyl-4-phenylpiperidine-4-carboxylic acid.
22. Phenazocine.
23. Phencyclidine.
24. 1-Phenylcyclohexylamine.
25. Piminodine.
26. 1-Piperidinocyclohexanecarbonitrile.
27. Racemethorphan.
28. Racemorphan.
29. Sufentanil.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including their salts, isomers, optical isomers, salts of their isomers, and salts of their optical isomers:

1. Amobarbital.
2. Amphetamine.
3. Glutethimide.
4. Methamphetamine.
5. Methylphenidate.
6. Pentobarbital.
7. Phenmetrazine.
8. Phenylacetone.
9. Secobarbital.

(3) SCHEDULE III.—A substance in Schedule III has a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. The following substances are controlled in Schedule III:

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant or stimulant effect on the nervous system:

1. Any substance which contains any quantity of a derivative of barbituric acid, including thiobarbituric acid, or any salt of a derivative of barbituric acid or thiobarbituric acid, including, but not limited to, butabarbital and butalbital.
2. Benzphetamine.
3. Chlorhexadol.
4. Chlorphentermine.
5. Clortermine.

§ 6.2

DRUG OFFENSES

6-27

6. Lysergic acid.
7. Lysergic acid amide.
8. Methyprylon.
9. Phendimetrazine.
10. Sulfondiethylmethane.
11. Sulfonethylmethane.
12. Sulfonmethane.
13. Tiletamine and zolazepam or any salt thereof.

(b) Nalorphine.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following controlled substances or any salts thereof:

1. Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.
2. Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.
3. Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.
4. Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.
5. Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with

recognized therapeutic amounts of one or more active ingredients which are not controlled substances.

6. Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

7. Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.

(d) Anabolic steroids.

1. The term “anabolic steroid” means any drug or hormonal substance, chemically and pharmacologically related to testosterone, other than estrogens, progestins, and corticosteroids, that promotes muscle growth and includes:

- a. Androsterone.
- b. Androsterone acetate.
- c. Boldenone.
- d. Boldenone acetate.
- e. Boldenone benzoate.
- f. Boldenone undecylenate.
- g. Chlorotestosterone (4-chlorotestosterone).
- h. Clostebol.
- i. Dehydrochloromethyltestosterone.
- j. Dihydrotestosterone (4-dihydrotestosterone).
- k. Drostanolone.
- l. Ethylestrenol.
- m. Fluoxymesterone.
- n. Formebolone (formebolone).
- o. Mesterolone.
- p. Methandienone.

§ 6.2

DRUG OFFENSES

6-29

- q. Methandranone.
- r. Methandriol.
- s. Methandrostenolone.
- t. Methenolone.
- u. Methyltestosterone.
- v. Mibolerone.
- w. Nandrolone.
- x. Norethandrolone.
- y. Nortestosterone.
- z. Nortestosterone decanoate.
- aa. Nortestosterone phenylpropionate.
- bb. Nortestosterone propionate.
- cc. Oxandrolone.
- dd. Oxymesterone.
- ee. Oxymetholone.
- ff. Stanolone.
- gg. Stanozolol.
- hh. Testolactone.
- ii. Testosterone.
- jj. Testosterone acetate.
- kk. Testosterone benzoate.
- ll. Testosterone cypionate.
- mm. Testosterone decanoate.
- nn. Testosterone enanthate.
- oo. Testosterone isocaproate.
- pp. Testosterone oleate.
- qq. Testosterone phenylpropionate.
- rr. Testosterone propionate.
- ss. Testosterone undecanoate.
- tt. Trenbolone.

6-30 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.2

- uu. Trenbolone acetate.
- vv. Any salt, ester, or isomer of a drug or substance described or listed in this subparagraph if that salt, ester, or isomer promotes muscle growth.

2. The term does not include an anabolic steroid that is expressly intended for administration through implants to cattle or other nonhuman species and that has been approved by the United States Secretary of Health and Human Services for such administration. However, any person who prescribes, dispenses, or distributes such a steroid for human use is considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of this paragraph.

(e) Ketamine, including any isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation.

(f) Dronabinol (synthetic THC) in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the United States Food and Drug Administration.

(g) Any drug product containing gamma-hydroxybutyric acid, including its salts, isomers, and salts of isomers, for which an application is approved under s. 505 of the Federal Food, Drug, and Cosmetic Act.

(4) SCHEDULE IV.—A substance in Schedule IV has a low potential for abuse relative to the substances in Schedule III and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to limited physical or psychological dependence relative to the substances in Schedule III. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, are controlled in Schedule IV:

- (a) Alprazolam.

§ 6.2

DRUG OFFENSES

6-31

- (b) Barbital.
- (c) Bromazepam.
- (d) Camazepam.
- (e) Cathine.
- (f) Chloral betaine.
- (g) Chloral hydrate.
- (h) Chlordiazepoxide.
- (i) Clobazam.
- (j) Clonazepam.
- (k) Clorazepate.
- (l) Clotiazepam.
- (m) Cloxazolam.
- (n) Delorazepam.
- (o) Dextropropoxyphene (dosage forms).
- (p) Diazepam.
- (q) Diethylpropion.
- (r) Estazolam.
- (s) Ethchlorvynol.
- (t) Ethinamate.
- (u) Ethyl loflazepate.
- (v) Fencamfamin.
- (w) Fenfluramine.
- (x) Fenproporex.
- (y) Fludiazepam.
- (z) Flurazepam.
- (aa) Halazepam.
- (bb) Haloxazolam.
- (cc) Ketazolam.
- (dd) Loprazolam.
- (ee) Lorazepam.

6-32

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

- (ff) Lormetazepam.
- (gg) Mazindol.
- (hh) Mebutamate.
- (ii) Medazepam.
- (jj) Mefenorex.
- (kk) Meprobamate.
- (ll) Methohexital.
- (mm) Methylphenobarbital.
- (nn) Midazolam.
- (oo) Nimetazepam.
- (pp) Nitrazepam.
- (qq) Nordiazepam.
- (rr) Oxazepam.
- (ss) Oxazolam.
- (tt) Paraldehyde.
- (uu) Pemoline.
- (vv) Pentazocine.
- (ww) Phenobarbital.
- (xx) Phentermine.
- (yy) Pinazepam.
- (zz) Pipradrol.
- (aaa) Prazepam.
- (bbb) Propylhexedrine, excluding any patent or proprietary preparation containing propylhexedrine, unless otherwise provided by federal law.
- (ccc) Quazepam.
- (ddd) Tetrazepam.
- (eee) SPA[(-)-1 dimethylamino-1, 2 diphenylethane].
- (fff) Temazepam.
- (ggg) Triazolam.

§ 6.2

DRUG OFFENSES

6–33

(hhh) Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

(iii) Butorphanol tartrate.

(5) SCHEDULE V.—A substance, compound, mixture, or preparation of a substance in Schedule V has a low potential for abuse relative to the substances in Schedule IV and has a currently accepted medical use in treatment in the United States, and abuse of such compound, mixture, or preparation may lead to limited physical or psychological dependence relative to the substances in Schedule IV.

(a) Substances controlled in Schedule V include any compound, mixture, or preparation containing any of the following limited quantities of controlled substances, which shall include one or more active medicinal ingredients which are not controlled substances in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the controlled substance alone:

1. Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

2. Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

3. Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

4. Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

5. Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

(b) Narcotic drugs. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs and their salts: Buprenorphine.

(c) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances

having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers: Pyrovalerone.

History.—s. 3, ch. 73-331; s. 247, ch. 77-104; s. 1, ch. 77-174; ss. 1, 2, ch. 78-195; s. 2, ch. 79-325; s. 1, ch. 80-353; s. 1, ch. 82-16; s. 1, ch. 84-89; s. 2, ch. 85-242; s. 1, ch. 86-147; s. 2, ch. 87-243; s. 1, ch. 87-299; s. 1, ch. 88-59; s. 3, ch. 89-281; s. 54, ch. 92-69; s. 1, ch. 93-92; s. 4, ch. 95-415; s. 1, ch. 96-360; ss. 1, 5, ch. 97-1; s. 96, ch. 97-264; s.1, ch. 99-186; s. 2, ch. 2000-320; s. 1, ch. 2001-55; s. 5, ch. 2001-57.

Notes.—n1 Section 1, ch. 97-1, added paragraph (4) (w) listing fenfluramine. Section 5, ch. 97-1, repealed paragraph (4) (w) effective upon the removal of fenfluramine from the schedules of controlled substances in 21 C.F.R. s. 1308. The Drug Enforcement Administration of the United States Department of Justice filed a proposed final rule removing fenfluramine from the schedules, *see* 62 F.R. 24620, May 6, 1997.

893.033 Listed chemicals.

The chemicals listed in this section are included by whatever official, common, usual, chemical, or trade name designated.

(1) **PRECURSOR CHEMICALS.**—The term “listed precursor chemical” means a chemical that may be used in manufacturing a controlled substance in violation of this chapter and is critical to the creation of the controlled substance, and such term includes any salt, optical isomer, or salt of an optical isomer, whenever the existence of such salt, optical isomer, or salt of optical isomer is possible within the specific chemical designation. The following are “listed precursor chemicals”:

- (a) Anthranilic acid.
- (b) Benzyl chloride.
- (c) Benzyl cyanide.
- (d) Ephedrine.
- (e) Ergonovine.
- (f) Ergotamine.
- (g) Ethylamine.
- (h) Isosafrole.
- (i) Methylamine.
- (j) 3, 4-Methylenedioxyphenyl-2-propanone.

§ 6.2

DRUG OFFENSES

6-35

- (k) N-acetylanthranilic acid.
- (l) N-ethylephedrine.
- (m) N-ethylpseudoephedrine.
- (n) N-methylephedrine.
- (o) N-methylpseudoephedrine.
- (p) Norpseudoephedrine.
- (q) Phenylacetic acid.
- (r) Phenylpropanolamine.
- (s) Piperidine.
- (t) Piperonal.
- (u) Propionic anhydride.
- (v) Pseudoephedrine.
- (w) Safrole.

(2) ESSENTIAL CHEMICALS.—The term “listed essential chemical” means a chemical that may be used as a solvent, reagent, or catalyst in manufacturing a controlled substance in violation of this chapter. The following are “listed essential chemicals”:

- (a) Acetic anhydride.
- (b) Acetone.
- (c) 2-Butanone.
- (d) Ethyl ether.
- (e) Hydriodic acid.
- (f) Potassium permanganate.
- (g) Toluene.

History.—s. 2, ch. 91-279.

893.035 Control of new substances; findings of fact; delegation of authority to Attorney General to control substances by rule.

(1)(a) New substances are being created which are not controlled under the provisions of this chapter but which have a potential for abuse similar to or greater than that for substances

controlled under this chapter. These new substances are sometimes called “designer drugs” because they can be designed to produce a desired pharmacological effect and to evade the controlling statutory provisions. Designer drugs are being manufactured, distributed, possessed, and used as substitutes for controlled substances.

(b) The hazards attributable to the traffic in and use of these designer drugs are increased because their unregulated manufacture produces variations in purity and concentration.

(c) Many such new substances are untested, and it cannot be immediately determined whether they have useful medical or chemical purposes.

(d) The uncontrolled importation, manufacture, distribution, possession, or use of these designer drugs has a substantial and detrimental impact on the health and safety of the people of Florida.

(e) These designer drugs can be created more rapidly than they can be identified and controlled by action of the Legislature. There is a need for a speedy and expert administrative determination of their proper classification under this chapter. It is therefore necessary to delegate to an administrative agency restricted authority to identify and classify new substances that have a potential for abuse, so that they can be controlled in the same manner as other substances currently controlled under this chapter.

(2) The Attorney General shall apply the provisions of this section to any substance not currently controlled under the provisions of s. 893.03. The Attorney General may by rule:

(a) Add a substance to a schedule established by s. 893.03, or transfer a substance between schedules, if he or she finds that it has a potential for abuse and he makes with respect to it the other findings appropriate for classification in the particular schedule under s. 893.03 in which it is to be placed.

(b) 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.

§ 6.2

DRUG OFFENSES

6–37

Rules adopted under this section shall be made pursuant to the rulemaking procedures prescribed by chapter 120.

(3)(a) The term “potential for abuse” in this section means that a substance has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of its being:

1. Used in amounts that create a hazard to the user’s health or the safety of the community;
2. Diverted from legal channels and distributed through illegal channels; or
3. 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.

(b) The terms “immediate precursor” and “narcotic drug” shall be given the same meanings as provided by s. 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. s. 802, as amended and in effect on April 1, 1985.

(4) In making any findings under this section, the Attorney General shall consider the following factors with respect to each substance proposed to be controlled or removed from control:

- (a) Its actual or relative potential for abuse.
- (b) Scientific evidence of its pharmacological effect, if known.
- (c) The state of current scientific knowledge regarding the drug or other substance.
- (d) Its history and current pattern of abuse.
- (e) The scope, duration, and significance of abuse.
- (f) What, if any, risk there is to the public health.

- (g) Its psychic or physiological dependence liability.
- (h) Whether the substance is an immediate precursor of a substance already controlled under this chapter.

The findings and conclusions of the United States Attorney General or his or her delegee, as set forth in the Federal Register, with respect to any substance pursuant to s. 201 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. s. 811, as amended and in effect on April 1, 1985, shall be admissible as evidence in any rulemaking proceeding under this section, including an emergency rulemaking proceeding under subsection (7).

(5) Before initiating proceedings under subsection (2), the Attorney General shall request from the Department of Health and the Department of Law Enforcement a medical and scientific evaluation of the substance under consideration and a recommendation as to the appropriate classification, if any, of such substance as a controlled substance. In responding to this request, the Department of Health and the Department of Law Enforcement shall consider the factors listed in subsection (4). The Department of Health and the Department of Law Enforcement shall respond to this request promptly and in writing; however, their response shall not be subject to the provisions of chapter 120. If both the Department of Health and the Department of Law Enforcement recommend that a substance not be controlled, the Attorney General shall not control that substance. If the Attorney General determines, based on the evaluations and recommendations of the Department of Health and the Department of Law Enforcement and all other available evidence, that there is substantial evidence of potential for abuse, he or she shall initiate proceedings under paragraph (2)(a) with respect to that substance.

(6)(a) The Attorney General shall by rule exempt any nonnarcotic substance controlled by rule under this section from the application of this section if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.

(b) The Attorney General may by rule exempt any compound, mixture, or preparation containing a substance controlled by rule

§ 6.2

DRUG OFFENSES

6–39

under this section from the application of this section if he or she finds that such compound, mixture, or preparation meets the requirements of either of the following subcategories:

1. A mixture or preparation containing a nonnarcotic substance controlled by rule, which mixture or preparation is approved for prescription use and which contains one or more other active ingredients which are not listed in any schedule and which are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse.

2. A compound, mixture, or preparation which contains any substance controlled by rule, 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.

(7)(a) If the Attorney General finds that the scheduling of a substance in Schedule I of s. 893.03 on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may by rule and without regard to the requirements of subsection (5) relating to the Department of Health and the Department of Law Enforcement schedule such substance in Schedule I if the substance is not listed in any other schedule of s. 893.03. The Attorney General shall be required to consider, with respect to his or her finding of imminent hazard to the public safety, only those factors set forth in paragraphs (3)(a) and (4)(d), (e), and (f), including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(b) The Attorney General may use emergency rulemaking provisions under s. 120.54(4) in scheduling substances under this subsection. Notwithstanding the provisions of s. 120.54(9)(c), any rule adopted under this subsection shall not expire except as provided in subsection (9).

(8)(a) Upon the effective date of a rule adopted pursuant to this section adding or transferring a substance to a schedule under s. 893.03, such substance shall be deemed included in that schedule, and all provisions of this chapter applicable to substances in that schedule shall be deemed applicable to such substance.

(b) A rule adopted pursuant to this section shall continue in effect until it is repealed; until it is declared invalid in proceedings under s. 120.56 or in proceedings before a court of competent jurisdiction; or until it expires under the provisions of subsection (9).

(9) The Attorney General shall report to the Legislature by March 1 of each year concerning the rules adopted under this section during the previous year. Each rule so reported shall expire on the following June 30 unless the Legislature adopts the provisions thereof as an amendment to this chapter.

(10) The repeal, expiration, or determination of invalidity of any rule shall not operate to create any claim or cause of action against any law enforcement officer or other enforcing authority for actions taken in good faith in reliance on the validity of the rule.

(11) In construing this section, due consideration and great weight should be given to interpretations of the United States Attorney General and the federal courts relating to s. 201 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. s. 811, as amended and in effect on April 1, 1985. All substantive rules adopted under this part shall not be inconsistent with the rules of the United States Attorney General and the decisions of the federal courts interpreting the provisions of s. 201 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. s. 811, as amended and in effect on April 1, 1985.

(12) The adoption of a rule transferring a substance from one schedule to another or removing a substance from a schedule pursuant to this section shall not affect prosecution or punishment for any crime previously committed with respect to that substance.

History.—s. 3, ch. 85-242; s. 72, ch. 87-226; s. 255, ch. 94-218; s. 318, ch. 96-410; s. 1826, ch. 97-102; s. 16, ch. 99-186.

893.0355 Control of scheduled substances; delegation of authority to Attorney General to reschedule substance, or delete substance, by rule.

(1) The Legislature has determined that, from time to time, additional testings, approvals, or scientific evidence may indicate

§ 6.2

DRUG OFFENSES

6-41

that controlled substances listed in Schedules I, II, III, IV, and V hereof have a greater potential for beneficial medical use in treatment in the United States than was evident when such substances were initially scheduled. It is the intent of the Legislature to quickly provide a method for an immediate change to the scheduling and control of such substances to allow for the beneficial medical use thereof so that more flexibility will be available than is possible through rescheduling legislatively.

(2) The Attorney General is hereby delegated the authority to adopt rules rescheduling specified substances to a less controlled schedule, or deleting specified substances from a schedule, upon a finding that reduced control of such substances is in the public interest. In determining whether reduced control of a substance is in the public interest, the Attorney General shall consider the following:

- (a) Whether the substance has been rescheduled or deleted from any schedule by rule adopted by the United States Attorney General pursuant to s. 201 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. s. 811.
- (b) The substance's actual or relative potential for abuse.
- (c) Scientific evidence of the substance's pharmacological effect, if known.
- (d) The state of current scientific knowledge regarding the substance.
- (e) The substance's history and current pattern of abuse.
- (f) The scope, duration, and significance of abuse.
- (g) What, if any, risk there is to the public health.
- (h) The substance's psychic or physiological dependence liability.

(3) In making the public interest determination, the Attorney General shall give great weight to the scheduling rules adopted by the United States Attorney General subsequent to such substances being listed in Schedules I, II, III, IV, and V hereof, to achieve the

original legislative purpose of the Florida Comprehensive Drug Abuse Prevention and Control Act of maintaining uniformity between the laws of Florida and the laws of the United States with respect to controlled substances.

(4) Rulemaking under this section shall be in accordance with the procedural requirements of chapter 120, including the emergency rule provisions found in s. 120.54. The Attorney General may initiate proceedings for adoption, amendment, or repeal of any rule on his own motion or upon the petition of any interested party.

(5) Upon the effective date of a rule adopted pursuant to this section, the rule's rescheduling or deletion of a substance shall be effective for all purposes under this chapter.

(6) Rules adopted pursuant to this section shall be reviewed each year by the Legislature. Each rule shall remain in effect until the effective date of legislation that provides for a different scheduling of a substance than that set forth in such rule.

(7) The adoption of a rule rescheduling a substance or deleting a substance from control pursuant to this section shall not affect prosecution or punishment for any crime previously committed with respect to that substance.

(8) The provisions of this section apply only to substances controlled expressly by statute and not to substances controlled by rules adopted under the authority granted in the provisions of s. 893.035.

History.—s. 4, ch. 85-242; s. 1435, ch. 97-102.

**893.0356 Control of new substances; findings of fact;
“controlled substance analog” defined.**

(1)(a) New substances are being created which are not controlled under the provisions of this chapter but which have a potential for abuse similar to or greater than that for substances controlled under this chapter. These new substances are called “controlled substance analogs,” and can be designed to produce a desired pharmacological effect and to evade the controlling statutory provisions. Controlled substance analogs are being

§ 6.2

DRUG OFFENSES

6-43

manufactured, distributed, possessed, and used as substitutes for controlled substances.

(b) The hazards attributable to the traffic in and use of controlled substance analogs are increased because their unregulated manufacture produces variations in purity and concentration.

(c) Many such new substances are untested, and it cannot be immediately determined whether they have useful medical or chemical purposes.

(d) The uncontrolled importation, manufacture, distribution, possession, or use of controlled substance analogs has a substantial and detrimental impact on the health and safety of the people of Florida.

(e) Controlled substance analogs can be created more rapidly than they can be identified and controlled by action of the Legislature. There is a need for a speedy determination of their proper classification under this chapter. It is therefore necessary to identify and classify new substances that have a potential for abuse, so that they can be controlled in the same manner as other substances currently controlled under this chapter.

(2)(a) As used in this section, “controlled substance analog” means a substance which, due to its chemical structure and potential for abuse, meets the following criteria:

1. Is substantially similar to that of a controlled substance listed in Schedule I or Schedule II of s. 893.03; and
2. Has a stimulant, depressant, or hallucinogenic effect on the central nervous system or is represented or intended to have 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 of s. 893.03.

(b) “Controlled substance analog” does not include:

1. A controlled substance;
2. Any substance for which there is an approved new drug application;

3. 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

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

(3) The term “potential for abuse” in this section means that a substance has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of its being:

- (a) Used in amounts that create a hazard to the user’s health or the safety of the community;
- (b) Diverted from legal channels and distributed through illegal channels; or
- (c) 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.

(4) The following factors shall be relevant to a finding that a substance is a controlled substance analog within the purview of this section:

- (a) Its actual or relative potential for abuse.
- (b) Scientific evidence of its pharmacological effect, if known.
- (c) The state of current scientific knowledge regarding the substance.
- (d) Its history and current pattern of abuse.

§ 6.2

DRUG OFFENSES

6-45

- (e) The scope, duration, and significance of abuse.
- (f) What, if any, risk there is to the public health.
- (g) Its psychic or physiological dependence liability.
- (h) Its diversion from legitimate channels, and clandestine importation, manufacture, or distribution.
- (i) Whether the substance is an immediate precursor of a substance already controlled under this chapter.

(5) A controlled substance analog shall, for purposes of drug abuse prevention and control, be treated as a controlled substance in Schedule I of s. 893.03.

(6) In construing this section, due consideration and great weight should be given to interpretations of the United States Attorney General and the federal courts relating to s. 201 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. s. 811, as amended and in effect on April 1, 1985. New substances controlled under this section shall not be treated in a manner inconsistent with the rules of the United States Attorney General and the decisions of the federal courts interpreting the provisions of s. 201 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. s. 811, as amended and in effect on April 1, 1985.

(7) The treatment of a new substance as a controlled substance pursuant to this section shall not affect prosecution or punishment for any crime previously committed with respect to that substance.

History.—s. 3, ch. 87-243; s. 11, ch. 99-186; s. 20, ch. 2000-320.

893.04 Pharmacist and practitioner.

(1) A pharmacist, in good faith and in the course of professional practice only, may dispense controlled substances upon a written or oral prescription of a practitioner, under the following conditions:

- (a) Oral prescriptions must be promptly reduced to writing by the pharmacist.
- (b) The written prescription must be dated and signed by the prescribing practitioner on the day when issued.

(c) There shall appear on the face of the prescription or written record thereof for the controlled substance the following information:

1. The full name and address of the person for whom, or the owner of the animal for which, the controlled substance is dispensed.
2. The full name and address of the prescribing practitioner and the practitioner's federal controlled substance registry number shall be printed thereon.
3. If the prescription is for an animal, the species of animal for which the controlled substance is prescribed.
4. The name of the controlled substance prescribed and the strength, quantity, and directions for use thereof.
5. The number of the prescription, as recorded in the prescription files of the pharmacy in which it is filled.
6. The initials of the pharmacist filling the prescription and the date filled.

(d) The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of 2 years.

(e) Affixed to the original container in which a controlled substance is delivered upon a prescription or authorized refill thereof, as hereinafter provided, there shall be a label bearing the following information:

1. The name and address of the pharmacy from which such controlled substance was dispensed.
2. The date on which the prescription for such controlled substance was filled.
3. The number of such prescription, as recorded in the prescription files of the pharmacy in which it is filled.
4. The name of the prescribing practitioner.

§ 6.2

DRUG OFFENSES

6-47

5. The name of the patient for whom, or of the owner and species of the animal for which, the controlled substance is prescribed.

6. The directions for the use of the controlled substance prescribed in the prescription.

7. A clear, concise warning that it is a crime to transfer the controlled substance to any person other than the patient for whom prescribed.

(f) A prescription for a controlled substance listed in Schedule II may be dispensed only upon a written prescription of a practitioner, except that in an emergency situation, as defined by regulation of the Department of Health, such controlled substance may be dispensed upon oral prescription. No prescription for a controlled substance listed in Schedule II may be refilled.

(g) No prescription for a controlled substance listed in Schedules III, IV, or V may be filled or refilled more than five times within a period of 6 months after the date on which the prescription was written unless the prescription is renewed by a practitioner.

(2) Notwithstanding the provisions of subsection (1), a pharmacist may dispense a one-time emergency refill of up to a 72-hour supply of the prescribed medication for any medicinal drug other than a medicinal drug listed in Schedule II, in compliance with the provisions of s. 465.0275.

(3) The legal owner of any stock of controlled substances in a pharmacy, upon discontinuance of dealing in controlled substances, may sell said stock to a manufacturer, wholesaler, or pharmacy. Such controlled substances may be sold only upon an order form, when such an order form is required for sale by the drug abuse laws of the United States or this state, or regulations pursuant thereto.

History.—s. 4, ch. 73-331; s. 2, ch. 75-18; s. 12, ch. 79-12; s. 2, ch. 90-2; s. 1436, ch. 97-102; s. 301, ch. 99-8.

893.05 Practitioners and persons administering controlled substances in their absence.

(1) A practitioner, in good faith and in the course of his or her professional practice only, may prescribe, administer, dispense, mix, or otherwise prepare a controlled substance, or the practitioner may cause the same to be administered by a licensed nurse or an intern practitioner under his or her direction and supervision only. A veterinarian may so prescribe, administer, dispense, mix, or prepare a controlled substance for use on animals only, and may cause it to be administered by an assistant or orderly under his direction and supervision only.

(2) When any controlled substance is dispensed by a practitioner, there shall be affixed to the original container in which the controlled substance is delivered a label on which appears:

- (a) The date of delivery.
- (b) The directions for use of such controlled substance.
- (c) The name and address of such practitioner.
- (d) The name of the patient and, if such controlled substance is prescribed for an animal, a statement describing the species of the animal.
- (e) A clear, concise warning that it is a crime to transfer the controlled substance to any person other than the patient for whom prescribed.

(3) Any person who obtains from a practitioner or the practitioner's agent, or pursuant to prescription, any controlled substance for administration to a patient during the absence of such practitioner shall return to such practitioner any unused portion of such controlled substance when it is no longer required by the patient.

History.—s. 5, ch. 73-331; s. 1437, ch. 97-102.

893.06 Distribution of controlled substances; order forms; labeling and packaging requirements.

(1) Controlled substances in Schedules I and II shall be distributed by a duly licensed manufacturer, distributor, or wholesaler to

§ 6.2

DRUG OFFENSES

6-49

a duly licensed manufacturer, wholesaler, distributor, practitioner, pharmacy, as defined in chapter 465, hospital, or laboratory only pursuant to an order form. It shall be deemed a compliance with this subsection if the parties to the transaction have complied with federal law respecting the use of order forms.

(2) Possession or control of controlled substances obtained as authorized by this section shall be lawful if in the regular course of business, occupation, profession, employment, or duty.

(3) A person in charge of a hospital or laboratory or in the employ of this state or of any other state, or of any political subdivision thereof, and a master or other proper officer of a ship or aircraft, who obtains controlled substances under the provisions of this section or otherwise, shall not administer, dispense, or otherwise use such controlled substances within this state, except within the scope of his or her employment or official duty, and then only for scientific or medicinal purposes and subject to the provisions of this chapter.

(4) It shall be unlawful to distribute a controlled substance in a commercial container unless such container bears a label showing the name and address of the manufacturer, the quantity, kind, and form of controlled substance contained therein, and the identifying symbol for such substance, as required by federal law. No person except a pharmacist, for the purpose of dispensing a prescription, or a practitioner, for the purpose of dispensing a controlled substance to a patient, shall alter, deface, or remove any labels so affixed.

History.—s. 6, ch. 73-331; s. 1438, ch. 97-102.

893.07 Records.

(1) Every person who engages in the manufacture, compounding, mixing, cultivating, growing, or by any other process producing or preparing, or in the dispensing, importation, or, as a wholesaler, distribution, of controlled substances shall:

(a) On January 1, 1974, or as soon thereafter as any person first engages in such activity, and every second year thereafter, make a complete and accurate record of all stocks of controlled substances on hand. The inventory may be prepared on the regular

physical inventory date which is nearest to, and does not vary by more than 6 months from, the biennial date that would otherwise apply. As additional substances are designated for control under this chapter, they shall be inventoried as provided for in this subsection.

(b) On and after January 1, 1974, maintain, on a current basis, a complete and accurate record of each substance manufactured, received, sold, delivered, or otherwise disposed of by him, except that this subsection shall not require the maintenance of a perpetual inventory.

Compliance with the provisions of federal law pertaining to the keeping of records of controlled substances shall be deemed a compliance with the requirements of this subsection.

(2) The record of controlled substances received shall in every case show:

- (a) The date of receipt.
- (b) The name and address of the person from whom received.
- (c) The kind and quantity of controlled substances received.

(3) The record of all controlled substances sold, administered, dispensed, or otherwise disposed of shall show:

- (a) The date of selling, administering, or dispensing.
- (b) The correct name and address of the person to whom or for whose use, or the owner and species of animal for which, sold, administered, or dispensed.
- (c) The kind and quantity of controlled substances sold, administered, or dispensed.

(4) Every inventory or record required by this chapter, including prescription records, shall be maintained:

- (a) Separately from all other records of the registrant, or
- (b) Alternatively, in the case of Schedule III, IV, or V controlled substances, in such form that information required by

§ 6.2

DRUG OFFENSES

6-51

this chapter is readily retrievable from the ordinary business records of the registrant.

In either case, records shall be kept and made available for a period of at least 2 years for inspection and copying by law enforcement officers whose duty it is to enforce the laws of this state relating to controlled substances.

(5) Each person shall maintain a record which shall contain a detailed list of controlled substances lost, destroyed, or stolen, if any; the kind and quantity of such controlled substances; and the date of the discovering of such loss, destruction, or theft.

History.—s. 7, ch. 73-331; s. 1439, ch. 97-102.

893.08 Exceptions.

(1) The following may be distributed at retail without a prescription, but only by a registered pharmacist:

(a) Any compound, mixture, or preparation described in Schedule V.

(b) Any compound, mixture, or preparation containing any depressant or stimulant substance described in s. 893.03(2)(a) or (c) except any amphetamine drug or sympathomimetic amine drug or compound designated as a Schedule II controlled substance pursuant to this chapter; in s. 893.03(3)(a); or in Schedule IV, if:

1. The compound, mixture, or preparation contains one or more active medicinal ingredients not having depressant or stimulant effect on the central nervous system, and

2. Such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the controlled substances which do have a depressant or stimulant effect on the central nervous system.

(2) No compound, mixture, or preparation may be dispensed under subsection (1) unless such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold at retail without a prescription.

(3) The exemptions authorized by this section shall be subject to the following conditions:

(a) The compounds, mixtures, and preparations referred to in subsection (1) may be dispensed to persons under age 18 only on prescription. A bound volume must be maintained as a record of sale at retail of excepted compounds, mixtures, and preparations, and the pharmacist must require suitable identification from every unknown purchaser.

(b) Such compounds, mixtures, and preparations shall be sold by the pharmacist in good faith as a medicine and not for the purpose of evading the provisions of this chapter. The pharmacist may, in his discretion, withhold sale to any person whom he reasonably believes is attempting to purchase excepted compounds, mixtures, or preparations for the purpose of abuse.

(c) The total quantity of controlled substance listed in Schedule V which may be sold to any one purchaser within a given 48-hour period shall not exceed 120 milligrams of codeine, 60 milligrams dihydrocodeine, 30 milligrams of ethyl morphine, or 240 milligrams of opium.

(d) Nothing in this section shall be construed to limit the kind and quantity of any controlled substance that may be prescribed, administered, or dispensed to any person, or for the use of any person or animal, when it is prescribed, administered, or dispensed in compliance with the general provisions of this chapter.

(4) The dextrorotatory isomer of 3-methoxy-n-ethylmorphinan and its salts (dextromethorphan) shall not be deemed to be included in any schedule by reason of enactment of this chapter.

History.—s. 8, ch. 73-331; s. 1, ch. 77-174; s. 6, ch. 80-354; s. 4, ch. 89-281; s. 2, ch. 93-92; s. 1440, ch. 97-102; s. 105, ch. 97-264; s. 12, ch. 99-186.

893.09 Enforcement.

(1) The Department of Law Enforcement, all state agencies which regulate professions or institutions affected by the provisions of this chapter, and all peace officers of the state shall enforce all provisions of this chapter except those specifically delegated, and shall cooperate with all agencies charged with the enforcement of

§ 6.2

DRUG OFFENSES

6–53

the laws of the United States, this state, and all other states relating to controlled substances.

(2) Any agency authorized to enforce this chapter shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this chapter. Said action for an injunction shall be in addition to any other action, proceeding, or remedy authorized by law.

(3) All law enforcement officers whose duty it is to enforce this chapter shall have authority to administer oaths in connection with their official duties, and any person making a material false statement under oath before such law enforcement officers shall be deemed guilty of perjury and subject to the same punishment as prescribed for perjury.

(4) It shall be unlawful and punishable as provided in chapter 843 for any person to interfere with any such law enforcement officer in the performance of his official duties. It shall also be unlawful for any person falsely to represent himself to be authorized to enforce the drug abuse laws of this state, the United States, or any other state.

(5) No civil or criminal liability shall be imposed by virtue of this chapter upon any person whose duty it is to enforce the provisions of this chapter, by reason of his being lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

History.—s. 9, ch. 73-331; s. 1, ch. 77-174; s. 30, ch. 79-8; s. 1441, ch. 97-102.

893.10 Burden of proof.

(1) It shall not be necessary for the state to negative any exemption or exception set forth in this chapter in any indictment, information, or other pleading or in any trial, hearing, or other proceeding under this chapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

(2) In the case of a person charged under ¹s. 893.14(1) with the possession of a controlled substance, the label required under s.

893.04(1) or s. 893.05(2) shall be admissible in evidence and shall be prima facie evidence that such substance was obtained pursuant to a valid prescription form or dispensed by a practitioner while acting in the course of his professional practice.

History.—s. 10, ch. 73-331; s. 1442, ch. 97-102.

¹**Note.**—Repealed by s. 14, ch. 80-409.

893.105 Testing and destruction of seized substances.

(1) Any controlled substance or listed chemical seized as evidence may be sample tested and weighed by the seizing agency after the seizure. Any such sample and the analysis thereof shall be admissible into evidence in any civil or criminal action for the purpose of proving the nature, composition, and weight of the substance seized. In addition, the seizing agency may photograph or videotape, for use at trial, the controlled substance or listed chemical seized.

(2) Controlled substances or listed chemicals that are not retained for sample testing as provided in subsection (1) may be destroyed pursuant to a court order issued in accordance with s. 893.12.

History.—s. 1, ch. 82-88; s. 3, ch. 91-279.

893.11 Suspension, revocation, and reinstatement of business and professional licenses.

Upon the conviction in any court of competent jurisdiction of any person holding a license, permit, or certificate issued by a state agency, for sale of, or trafficking in, a controlled substance or for conspiracy to sell, or traffic in, a controlled substance, if such offense is a felony, the clerk of said court shall send a certified copy of the judgment of conviction with the person's license number, permit number, or certificate number on the face of such certified copy to the agency head by whom the convicted defendant has received his license, permit, or certificate to practice his profession or to carry on his business. Such agency head shall suspend or revoke the license, permit, or certificate of the convicted defendant to practice his profession or to carry on his business. Upon a showing by any such convicted defendant whose license, permit, or certificate has been suspended or revoked pursuant

§ 6.2

DRUG OFFENSES

6–55

to this section that his civil rights have been restored or upon a showing that the convicted defendant meets the following criteria, the agency head may reinstate or reactivate such license, permit, or certificate when:

(1) The person has complied with the conditions of paragraphs (a) and (b) which shall be monitored by the Department of Corrections while the person is under any supervisory sanction. If the person fails to comply with provisions of these paragraphs by either failing to maintain treatment or by testing positive for drug use, the department shall notify the licensing, permitting, or certifying agency, which shall revoke the license, permit, or certification. The person under supervision may:

(a) Seek evaluation and enrollment in, and once enrolled maintain enrollment in until completion, a drug treatment and rehabilitation program which is approved or regulated by the Department of Children and Family Services. The treatment and rehabilitation program shall be specified by:

1. The court, in the case of court-ordered supervisory sanctions;
2. The Parole Commission, in the case of parole, control release, or conditional release; or
3. The Department of Corrections, in the case of imprisonment or any other supervision required by law.

(b) Submit to periodic urine drug testing pursuant to procedures prescribed by the Department of Corrections. If the person is indigent, the costs shall be paid by the Department of Corrections; or

(2) The person has successfully completed an appropriate program under the Correctional Education Program.

This section does not apply to any of the taxes, fees, or permits regulated, controlled, or administered by the Department of Revenue in accordance with s. 213.05.

History.—s. 11, ch. 73-331; s. 1, ch. 77-117; s. 19, ch. 78-95; s. 3, ch. 90-266; s. 126, ch. 91-112; s. 14, ch. 95-325; s. 1443, ch. 97-102; s. 302, ch. 99-8.

893.12 Contraband; seizure, forfeiture, sale.

(1) All substances controlled by this chapter and all listed chemicals, which substances or chemicals are handled, delivered, possessed, or distributed contrary to any provisions of this chapter, and all such controlled substances or listed chemicals the lawful possession of which is not established or the title to which cannot be ascertained, are declared to be contraband, are subject to seizure and confiscation by any person whose duty it is to enforce the provisions of the chapter, and shall be disposed of as follows:

(a) Except as in this section otherwise provided, the court having jurisdiction shall order such controlled substances or listed chemicals forfeited and destroyed. A record of the place where said controlled substances or listed chemicals were seized, of the kinds and quantities of controlled substances or listed chemicals destroyed, and of the time, place, and manner of destruction shall be kept, and a return under oath reporting said destruction shall be made to the court or magistrate and to the United States Drug Enforcement Administration by the officer who destroys them.

(b) Upon written application by the Department of Health, the court by whom the forfeiture of such controlled substances or listed chemicals has been decreed may order the delivery of any of them to said department for distribution or destruction as hereinafter provided.

(c) Upon application by any hospital or laboratory within the state not operated for private gain, the department may, in its discretion, deliver any controlled substances or listed chemicals that have come into its custody by authority of this section to the applicant for medical use. The department may from time to time deliver excess stocks of such controlled substances or listed chemicals to the United States Drug Enforcement Administration or destroy same.

(d) The department shall keep a full and complete record of all controlled substances or listed chemicals received and of all controlled substances or listed chemicals disposed of, showing:

1. The exact kinds, quantities, and forms of such controlled substances or listed chemicals;

§ 6.2

DRUG OFFENSES

6-57

2. The persons from whom received and to whom delivered;
3. By whose authority received, delivered, and destroyed;
and
4. The dates of the receipt, disposal, or destruction, which record shall be open to inspection by all persons charged with the enforcement of federal and state drug abuse laws.

(2)(a) Any vessel, vehicle, aircraft, or drug paraphernalia as defined in s. 893.145 which has been or is being used in violation of any provision of this chapter or in, upon, or by means of which any violation of this chapter has taken or is taking place may be seized and forfeited as provided by the Florida Contraband Forfeiture Act.

(b) All real property, including any right, title, leasehold interest, and other interest in the whole of any lot or tract of land and any appurtenances or improvements, which real property is used, or intended to be used, in any manner or part, to commit or to facilitate the commission of, or which real property is acquired with proceeds obtained as a result of, a violation of any provision of this chapter related to a controlled substance described in s. 893.03(1) or (2) may be seized and forfeited as provided by the Florida Contraband Forfeiture Act except that no property shall be forfeited under this paragraph to the extent of an interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed or omitted without the knowledge or consent of that owner or lienholder.

(c) All moneys, negotiable instruments, securities, and other things of value furnished or intended to be furnished by any person in exchange for a controlled substance described in s. 893.03(1) or (2) or a listed chemical in violation of any provision of this chapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of any provision of this chapter or which are acquired with proceeds obtained in violation of any provision of this chapter may be seized and forfeited as provided by the Florida Contraband Forfeiture Act, except that

no property shall be forfeited under this paragraph to the extent of an interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed or omitted without the knowledge or consent of that owner or lienholder.

(d) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, or which are acquired with proceeds obtained, in violation of any provision of this chapter related to a controlled substance described in s. 893.03(1) or (2) or a listed chemical may be seized and forfeited as provided by the Florida Contraband Forfeiture Act.

(e) If any of the property described in this subsection:

1. Cannot be located;
2. Has been transferred to, sold to, or deposited with, a third party;
3. Has been placed beyond the jurisdiction of the court;
4. Has been substantially diminished in value by any act or omission of the defendant; or
5. Has been commingled with any property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property subject to forfeiture under this subsection.

(3) Any law enforcement agency is empowered to authorize or designate officers, agents, or other persons to carry out the seizure provisions of this section. It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any vessel, vehicle, aircraft, real property or interest in real property, money, negotiable instrument, security, book, record, or research which has been or is being used or intended to be used, or which is acquired with proceeds obtained, in violation of any of the provisions of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place,

§ 6.2

DRUG OFFENSES

6–59

to seize such vessel, vehicle, aircraft, real property or interest in real property, money, negotiable instrument, security, book, record, or research and place it in the custody of such person as may be authorized or designated for that purpose by the respective law enforcement agency pursuant to these provisions.

(4) The rights of any bona fide holder of a duly recorded mortgage or duly recorded vendor's privilege on the property seized under this chapter shall not be affected by the seizure.

History.—s. 12, ch. 73-331; ss. 10, 11, ch. 74-385; s. 471, ch. 77-147; s. 185, ch. 79-164; s. 4, ch. 80-30; s. 9, ch. 80-68; s. 5, ch. 89-148; s. 4, ch. 91-279; s. 1444, ch. 97-102; s. 1, ch. 98-395; s. 303, ch. 99-8; s. 13, ch. 99-186; s. 21, ch. 2000-320.

893.13 Prohibited acts; penalties.

(1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. A controlled substance named or described in s. 893.03(5) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) Except as provided in this chapter, it is unlawful to sell or deliver in excess of 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b), or any combination thereof. Any person who violates this paragraph commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 a.m. Any person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 and must be sentenced to a minimum term of imprisonment of 3 calendar years.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. This paragraph does not apply to a child care facility unless the owner or operator of the facility posts a sign that is not less than 2 square feet in size with a word legend identifying the facility as a licensed child care facility and that is posted on the property of the child care facility in a conspicuous place where the sign is reasonably visible to the public.

(d) Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, within 200 feet of the real property comprising a public or private college, university, or other postsecondary educational institution, or within 200 feet of any public park. Any person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) commits a felony of the second

§ 6.2

DRUG OFFENSES

6–61

degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a \$500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

(e) Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture or deliver, a controlled substance not authorized by law in, on, or within 1,000 feet of a physical place for worship at which a church or religious organization regularly conducts religious services or within 1,000 feet of a convenience business as defined in s. 812.171. Any person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a \$500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

(f) Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility at any time. For purposes of this section, the term “real property comprising a public housing facility” means real property, as defined in s. 421.03(12), of a public corporation created as a housing authority pursuant to part I of chapter 421. Any person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay \$500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

(2)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to purchase, or possess with intent to purchase, a controlled substance. Any person who violates this provision with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b) or (2)(c)4., commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. A controlled substance named or described in s. 893.03(5) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) Except as provided in this chapter, it is unlawful to purchase in excess of 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b), or any combination thereof, or any mixture containing any such substance. Any person who violates this paragraph commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 6.2

DRUG OFFENSES

6–63

(3) Any person who delivers, without consideration, not more than 20 grams of cannabis, as defined in this chapter, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For the purposes of this paragraph, “cannabis” does not include the resin extracted from the plants of the genus *Cannabis* or any compound manufacture, salt, derivative, mixture, or preparation of such resin.

(4) Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of this chapter. Any person who violates this provision with respect to:

(a) A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Imposition of sentence may not be suspended or deferred, nor shall the person so convicted be placed on probation.

(5) It is unlawful for any person to bring into this state any controlled substance unless the possession of such controlled substance is authorized by this chapter or unless such person is licensed to do so by the appropriate federal agency. Any person who violates this provision with respect to:

(a) A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4), commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) commits a felony of the third

degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) A controlled substance named or described in s. 893.03(5) commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(6)(a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the offense is the possession of not more than 20 grams of cannabis, as defined in this chapter, the person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For the purposes of this subsection, “cannabis” does not include the resin extracted from the plants of the genus *Cannabis*, or any compound manufacture, salt, derivative, mixture, or preparation of such resin.

(c) Except as provided in this chapter, it is unlawful to possess in excess of 10 grams of any substance named or described in s. 893.03(1)(a) or (1)(b), or any combination thereof. Any person who violates this paragraph commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) Notwithstanding any provision to the contrary of the laws of this state relating to arrest, a law enforcement officer may arrest without warrant any person who the officer has probable cause to believe is violating the provisions of this chapter relating to possession of cannabis.

(7)(a) It is unlawful for any person:

1. To distribute or dispense a controlled substance in violation of this chapter.

§ 6.2

DRUG OFFENSES

6-65

2. To refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter.

3. To refuse an entry into any premises for any inspection or to refuse to allow any inspection authorized by this chapter.

4. To distribute a controlled substance named or described in s. 893.03(1) or (2) except pursuant to an order form as required by s. 893.06.

5. To keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

6. To use to his or her own personal advantage, or to reveal, any information obtained in enforcement of this chapter except in a prosecution or administrative hearing for a violation of this chapter.

7. To withhold information from a practitioner from whom the person seeks to obtain a controlled substance or a prescription for a controlled substance that the person has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the last 30 days.

8. To possess a prescription form which has not been completed and signed by the practitioner whose name appears printed thereon, unless the person is that practitioner, is an agent or employee of that practitioner, is a pharmacist, or is a supplier of prescription forms who is authorized by that practitioner to possess those forms.

9. To acquire or obtain, or attempt to acquire or obtain, possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.

10. To affix any false or forged label to a package or receptacle containing a controlled substance.

11. To furnish false or fraudulent material information in, or omit any material information from, any report or other document required to be kept or filed under this chapter or any record required to be kept by this chapter.

(b) Any person who violates the provisions of subparagraphs (a)1.-8. commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083; except that, upon a second or subsequent violation, the person commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) Any person who violates the provisions of subparagraphs (a)9.-11. commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(8) The provisions of subsections (1)-(7) are not applicable to the delivery to, or actual or constructive possession for medical or scientific use or purpose only of controlled substances by, persons included in any of the following classes, or the agents or employees of such persons, for use in the usual course of their business or profession or in the performance of their official duties:

(a) Pharmacists.

(b) Practitioners.

(c) Persons who procure controlled substances in good faith and in the course of professional practice only, by or under the supervision of pharmacists or practitioners employed by them, or for the purpose of lawful research, teaching, or testing, and not for resale.

(d) Hospitals that procure controlled substances for lawful administration by practitioners, but only for use by or in the particular hospital.

(e) Officers or employees of state, federal, or local governments acting in their official capacity only, or informers acting under their jurisdiction.

(f) Common carriers.

§ 6.2

DRUG OFFENSES

6-67

(g) Manufacturers, wholesalers, and distributors.

(h) Law enforcement officers for bona fide law enforcement purposes in the course of an active criminal investigation.

(9) Notwithstanding any provision of the sentencing guidelines to the contrary, on or after October 1, 1993, any defendant who:

(a) Violates subparagraph (1)(a)1., subparagraph (1)(c)2., subparagraph (1)(d)2., subparagraph (2)(a)1., or paragraph (5)(a); and

(b) Has not previously been convicted, regardless of whether adjudication was withheld, of any felony, other than a violation of subparagraph (1)(a)1., subparagraph (1)(c)2., subparagraph (1)(d)2., subparagraph (2)(a)1., or paragraph (5)(a),

may be required by the court to successfully complete a term of probation pursuant to the terms and conditions set forth in s. 948.034(1), in lieu of serving a term of imprisonment.

(10) Notwithstanding any provision of the sentencing guidelines to the contrary, on or after January 1, 1994, any defendant who:

(a) Violates subparagraph (1)(a)2., subparagraph (2)(a)2., paragraph (5)(b), or paragraph (6)(a); and

(b) Has not previously been convicted, regardless of whether adjudication was withheld, of any felony, other than a violation of subparagraph (1)(a)2., subparagraph (2)(a)2., paragraph (5)(b), or paragraph (6)(a),

may be required by the court to successfully complete a term of probation pursuant to the terms and conditions set forth in s. 948.034(2), in lieu of serving a term of imprisonment.

History.—s. 13, ch. 73-331; s. 1, ch. 76-200; s. 1, ch. 77-174; s. 2, ch. 79-1; s. 3, ch. 79-325; s. 5, ch. 80-30; s. 2, ch. 80-70; s. 490, ch. 81-259; s. 2, ch. 82-16; s. 52, ch. 83-215; s. 1, ch. 84-77; s. 5, ch. 85-242; s. 4, ch. 87-243; s. 2, ch. 88-381; s. 4, ch. 89-281; s. 1, ch. 89-524; ss. 1, 6, ch. 90-111; s. 1, ch. 93-59; s. 2, ch. 93-92; s. 1, ch. 93-194; ss. 22, 23, ch. 93-406; s. 2, ch. 96-360; s. 2, ch. 97-1; s. 1, ch. 97-43; s. 1827, ch. 97-102; s. 22, ch. 97-194; s. 106, cvh. 97-264; s. 1, ch. 97-269; s. 47, ch. 97-271; s. 1, ch. 98-22; s. 1, ch. 99-154; s. 14, ch. 99-186; s. 3, ch. 2000-320.

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.

¹(1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13:

(a) Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 50 pounds of cannabis commits a felony of the first degree, which felony shall be known as “trafficking in cannabis.” If the quantity of cannabis involved:

1. Is in excess of 50 pounds, but less than 2,000 pounds, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$25,000.
2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$50,000.
3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$200,000.

For the purpose of this paragraph, a plant, including, but not limited to, a seedling or cutting, is a “cannabis plant” if it has some readily observable evidence of root formation, such as root hairs. To determine if a piece or part of a cannabis plant severed from the cannabis plant is itself a cannabis plant, the severed piece or part must have some readily observable evidence of root formation, such as root hairs. Callous tissue is not readily observable evidence of root formation. The viability and sex of a plant and the fact the the plant may or may not be a dead harvested plant are not relevant in determining if the plant is a “cannabis plant” or in the charging of an offense under this paragraph. Upon conviction, the court shall impose the longest term of imprisonment provided for in this paragraph.

(b)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)4., or of any mixture

§ 6.2

DRUG OFFENSES

6-69

containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as “trafficking in cocaine.” If the quantity involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$50,000.

b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$100,000.

c. Is 400 grams or more, but less than 150 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 150 kilograms or more, but less than 300 kilograms, of cocaine, as described in s. 893.03(2)(a)4., commits the first degree felony of trafficking in cocaine. A person who has been convicted of the first degree felony of trafficking in cocaine under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

a. The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or

b. The person’s conduct in committing that act led to a natural, though not inevitable, lethal result,

such person commits the capital felony of trafficking in cocaine, punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

3. Any person who knowingly brings into this state 300 kilograms or more of cocaine, as described in s. 893.03(2)(a)4., and who knows that the probable result of such importation would be the death of any person, commits capital importation of cocaine, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(c)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as “trafficking in illegal drugs.” If the quantity involved:

a. Is 4 grams or more, but less than 14 grams, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$50,000.

b. Is 14 grams or more, but less than 28 grams, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$100,000.

c. Is 28 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and pay a fine of \$500,000.

2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 30 kilograms or more, but less than 60 kilograms, of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 30 kilograms or more, but less than 60 kilograms, of any mixture containing any such substance,

§ 6.2

DRUG OFFENSES

6-71

commits the first degree felony of trafficking in illegal drugs. A person who has been convicted of the first degree felony of trafficking in illegal drugs under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

- a. The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or
- b. The person's conduct in committing that act led to a natural, though not inevitable, lethal result,

such person commits the capital felony of trafficking in illegal drugs, punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

3. Any person who knowingly brings into this state 60 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 60 kilograms or more of any mixture containing any such substance, and who knows that the probable result of such importation would be the death of any person, commits capital importation of illegal drugs, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(d)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b), commits a felony of the first degree, which felony shall be known as "trafficking in phencyclidine." If the quantity involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$50,000.

b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$100,000.

c. Is 400 grams or more, but less than 800 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly brings into this state 800 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b), and who knows that the probable result of such importation would be the death of any person commits capital importation of phencyclidine, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(e)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 200 grams or more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(1)(d), commits a felony of the first degree, which felony shall be known as “trafficking in methaqualone.” If the quantity involved:

a. Is 200 grams or more, but less than 5 kilograms, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$50,000.

b. Is 5 kilograms or more, but less than 25 kilograms, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$100,000.

c. Is 25 kilograms or more, but less than 50 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

§ 6.2

DRUG OFFENSES

6-73

2. Any person who knowingly brings into this state 50 kilograms or more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(1)(d), and who knows that the probable result of such importation would be the death of any person commits capital importation of methaqualone, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(f)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 14 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s. 893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, or ephedrine in conjunction with other chemicals and equipment utilized in the manufacture of amphetamine or methamphetamine, commits a felony of the first degree, which felony shall be known as “trafficking in amphetamine.” If the quantity involved:

a. Is 14 grams or more, but less than 28 grams, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$50,000.

b. Is 28 grams or more, but less than 200 grams, such person shall be sentenced pursuant to the sentencing guidelines and pay a fine of \$100,000.

c. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly brings into this state 400 grams or more of amphetamine, as described in s. 893.03(2)(c)2., or methamphetamine, as described in s. 893.03(2)(c)4., or of any mixture containing amphetamine or methamphetamine, or phenylacetone, phenylacetic acid, or ephedrine in conjunction with other chemicals and equipment utilized in the manufacture

of amphetamine or methamphetamine, and who knows that the probable result of such importation would be the death of any person commits capital importation of amphetamine, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(g)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of flunitrazepam or any mixture containing flunitrazepam as described in s. 893.03 (1)(a) commits a felony of the first degree, which felony shall be known as “trafficking in flunitrazepam,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 4 grams or more but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 14 grams or more but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 28 grams or more but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and pay a fine of \$500,000.

2. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state or who is knowingly in actual or constructive possession of 30 kilograms or more of flunitrazepam or any mixture containing flunitrazepam as described in s. 893.03(1)(a) commits the first degree felony of trafficking in flunitrazepam. A person who has been convicted of the first degree felony of trafficking in flunitrazepam under this subparagraph shall be punished by life imprisonment and is ineligible for any form of discretionary early release except

§ 6.2

DRUG OFFENSES

6–75

pardon or executive clemency or conditional medical release under s. 947.149. However, if the court determines that, in addition to committing any act specified in this paragraph:

- a. The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result; or
- b. The person's conduct in committing that act lead to a natural, though not inevitable, lethal result,

such person commits the capital felony of trafficking of flunitrazepam, punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(h)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 kilogram or more of gamma-hydroxybutyric acid (GHB), as described in s. 893.03 (2)(b), or any mixture containing gamma-hydroxybutyric acid (GHB), commits a felony of the first degree, which felony shall be known as "trafficking in gamma-hydroxybutyric acid (GHB)," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 1 kilogram or more but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.
- b. Is 5 kilograms or more but less than 10 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.
- c. Is 10 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

2. Any person who knowingly manufactures or brings into this state 150 kilograms or more of gamma-hydroxybutyric acid

(GHB), as described in s. 893.03(2)(b), or any mixture containing gamma-hydroxybutyric (GHB), and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of gamma-hydroxybutyric acid (GHB), a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(i.)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 1 kilogram or more of 1,4-Butanediol as described in s. 893.03(2)(b), or of any mixture containing 1,4-Butanediol, commits a felony of the first degree, which felony shall be known as “trafficking in 1,4-Butanediol,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 1 kilogram or more, but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 5 kilograms or more, but less than 10 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 10 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$500,000.

2. Any person who knowingly manufactures or brings into this state 150 kilograms or more of 1,4-Butanediol as described in s. 893.03(2)(b), or any mixture containing 1,4 Butanediol, and who knows that the probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of 1,4-Butanediol, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also

§ 6.2

DRUG OFFENSES

6-77

be sentenced to pay the maximum fine provided under subparagraph 1.

(j)1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 10 grams or more of any of the following substances described in s. 893.03(1)(a) or (c):

- a. 3,4-Methylenedioxymethamphetamine (MDMA);
- b. 4-Bromo-2,5-dimethoxyamphetamine;
- c. 4-Bromo-2,5-dimethoxyphenethylamine;
- d. 2,5-Dimethoxyamphetamine;
- e. 2,5-Dimethoxy-4-ethylamphetamine (DOET);
- f. N-ethylamphetamine;
- g. N-Hydroxy-3,4-methylenedioxyamphetamine;
- h. 5-Methoxy-3,4-methylenedioxyamphetamine;
- i. 4-methoxyamphetamine;
- j. 4-Methyl-2,5-dimethoxyamphetamine;
- k. 3,4-Methylenedioxy-N-ethylamphetamine;
- l. 3,4-Methylenedioxyamphetamine;
- m. N,N-dimethylamphetamine; or
- n. 3,4,5-Trimethoxyamphetamine.

individually or in any combination of or any mixture containing any substance listed in sub-subparagraphs a.-n., commits a felony of the first degree, which felony shall be known as “trafficking in Phenethylamines,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. If the quantity involved:

- a. Is 10 grams or more but less than 200 grams, such person shall be sentenced to a mandatory minimum term of

imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.

b. Is 200 grams or more but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.

c. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

3. Any person who knowingly manufactures or brings into this state 30 kilograms or more of any of the following substances described in s. 893.03(1)(a) or (c):

- a. 3,4-Methylenedioxymethamphetamine (MDMA);
- b. 4-Bromo-2,5-dimethoxyamphetamine;
- c. 4-Bromo-2,5-dimethoxyphenethylamine;
- d. 2,5-Dimethoxyamphetamine;
- e. 2,5-Dimethoxy-4-ethylamphetamine (DOET);
- f. N-ethylamphetamine;
- g. N-Hydroxy-3,4-methylenedioxyamphetamine;
- h. 5-Methoxy-3,4-methylenedioxyamphetamine;
- i. 4-methoxyamphetamine;
- j. 4-Methyl-2,5-dimethoxyamphetamine;
- k. 3,4-Methylenedioxy-N-ethylamphetamine;
- l. 3,4-Methylenedioxyamphetamine;
- m. N,N-dimethylamphetamine; or
- n. 3,4,5-Trimethoxyamphetamine.

individually or in any combination of or any mixture containing any substance listed in sub-subparagraphs a.-n, and who knows that the

§ 6.2

DRUG OFFENSES

6-79

probable result of such manufacture or importation would be the death of any person commits capital manufacture or importation of Phenethylamines, a capital felony punishable as provided in ss. 775.082 and 921.142. Any person sentenced for a capital felony under this paragraph shall also be sentenced to pay the maximum fine provided under subparagraph 1.

(2) A person acts knowingly under subsection (1) if that person intends to sell, purchase, manufacture, deliver, or bring into this state, or to actually or constructively possess, any of the controlled substances listed in subsection (1), regardless of which controlled substance listed in subsection (1) is in fact sold, purchased, manufactured, delivered, or brought into this state, or actually or constructively possessed.

(3) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(4) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in trafficking in controlled substances. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if the judge finds that the defendant rendered such substantial assistance.

(5) Any person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by subsection (1) commits a felony of the first degree and is punishable as if he had actually committed such prohibited act. Nothing in this subsection shall be construed to prohibit separate convictions and sentences for a violation of this subsection and any violation of subsection (1).

History.—s. 1, ch. 79-1; s. 1, ch. 80-70; s. 2, ch. 80-353; s. 491, ch. 81-259; s. 1, ch. 82-2; s. 3, ch. 82-16; s. 53, ch. 83-215; s. 5, ch. 87-243; ss. 1, 4, ch. 89-281; s. 1, ch. 90-112; s. 3, ch. 93-92; s. 24, ch. 93-406; s. 15, ch. 95-184; s. 5, ch. 95-415; s. 54, ch. 96-388; s. 3, ch. 97-1; s. 1828, ch. 97-102; s. 23, ch. 97-194; s. 9, ch. 99-188; s. 4, ch. 2000-320.

893.1351 Lease or rent for the purpose of trafficking in a controlled substance.

(1) A person may not lease or rent any place, structure, or part thereof, trailer, or other conveyance, with the knowledge that such place, structure, trailer, or conveyance will be used for the purpose of trafficking in a controlled substance, as provided in s. 893.135, or the sale of a controlled substance, as provided in s. 893.13.

(2) A person who violates subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 1, ch. 91-118; s. 10, ch. 99-188; s. 22, ch. 2000-320.

893.138 Local administrative action to abate drug-related, prostitution-related, or stolen-property-related public nuisances and criminal street gang activity.

(1) It is the intent of this section to promote, protect, and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties in order to provide an equitable, expeditious, effective, and inexpensive method of enforcing ordinances in counties and municipalities under circumstances when a pending or repeated violation continues to exist.

(2) Any place or premises that has been used:

(a) On more than two occasions within a 6-month period, as the site of a violation of s. 796.07;

(b) On more than two occasions within a 6-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(c) On one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony

§ 6.2

DRUG OFFENSES

6–81

and that has been previously used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(d) By a criminal street gang for the purpose of conducting a pattern of criminal street gang activity as defined by s. 874.03; or

(e) On more than two occasions within a 6-month period, as the site of a violation os s. 812.019 relating to dealing in stolen property

may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided in this section.

(3) Any county or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances described in subsection (2). Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving not less than 3 days' written notice of such complaint to the owner of the place or premises at his last known address. After a hearing in which the board may consider any evidence, including evidence of the general reputation of the place or premises, and at which the owner of the premises shall have an opportunity to present evidence in his defense, the board may declare the place or premises to be a public nuisance as described in subsection (2).

(4) If the board declares a place or premises to be a public nuisance, it may enter an order requiring the owner of such place or premises to adopt such procedure as may be appropriate under the circumstances to abate any such nuisance or it may enter an order immediately prohibiting:

(a) The maintaining of the nuisance;

(b) The operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or

(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

(5) An order entered under subsection (4) shall expire after 1 year or at such earlier time as is stated in the order.

(6) An order entered under subsection (4) may be enforced pursuant to the procedures contained in s. 120.69. This subsection does not subject a municipality that creates a board under this section, or the board so created, to any other provision of chapter 120.

(7) The board may bring a complaint under s. 60.05 seeking temporary and permanent injunctive relief against any nuisance described in subsection (2).

(8) This section does not restrict the right of any person to proceed under s. 60.05 against any public nuisance.

(9) As used in this section, the term “controlled substance” includes any substance sold in lieu of a controlled substance in violation of s. 817.563 or any imitation controlled substance defined in s. 817.564.

(10) The provisions of this section may be supplemented by a county or municipal ordinance. The ordinance may include, but is not limited to, provisions that establish additional penalties for public nuisances, including fines not to exceed \$250 per day; provide for the payment of reasonable costs, including reasonable attorney fees associated with investigations of and hearings on public nuisances; provide for continuing jurisdiction for a period of 1 year over any place or premises that has been or is declared to be a public nuisance; establish penalties including fines not to exceed \$500 per day for recurring public nuisances; provide for the recording of orders on public nuisances so that notice must be given to subsequent purchasers, successors in interest, or assigns of the real property that is the subject of the order; provide that recorded orders on public nuisances may become liens against the real property that is the subject of the order; and provide for the foreclosure of property subject to a lien and the recovery of all costs, including reasonable attorney fees, associated with the recording of orders and foreclosure. No lien created pursuant to the provisions of this section may be foreclosed on real property which is a homestead under s. 4, Art. X of the State Constitution. Where a local government seeks to bring an administrative action, based on a stolen property nuisance, against a property owner operating an establishment where multiple tenants, on one site, conduct their own retail business, the property owner shall not

be subject to a lien against his property or the prohibition of operation provision if the property owner evicts the business declared to be a nuisance within 90 days after notification by registered mail to the property owner of a second stolen property conviction of the tenant. The total fines imposed pursuant to the authority of this section shall not exceed \$15,000. Nothing contained within this section prohibits a county or municipality from proceeding against a public nuisance by any other means.

History.—s. 7, ch. 87-243; s. 2, ch. 90-207; s. 1, ch. 91-143; s. 6, ch. 93-227; s. 1, ch. 94-242; s. 42, ch. 96-388; s. 1829, ch. 97-102; s. 1, ch. 97-200; s. 2, ch. 98-395; s. 1, ch. 2000-111.

893.145 “Drug paraphernalia” defined.

The term “drug paraphernalia means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter or s. 877.111. Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture. The term includes, but is not limited to:

- (1) Kits used, intended for use, or designed for use in the planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.
- (2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.
- (3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.
- (4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.
- (5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes, with or without screens, permanent screens, hashish heads, or punctured metal bowls.

(b) Water pipes.

(c) Carburetion tubes and devices.

(d) Smoking and carburetion masks.

(e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.

(f) Miniature cocaine spoons, and cocaine vials.

(g) Chamber pipes.

§ 6.2

DRUG OFFENSES

6–85

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

History.—s. 1, ch. 80-30; s. 6, ch. 2000-320; s. 15, ch. 2000-360.

893.146 Determination of paraphernalia.

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

- (1) Statements by an owner or by anyone in control of the object concerning its use.

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

History.—s. 2, ch. 80-30; s. 1445, ch. 97-102.

893.147 Use, possession, manufacture, delivery, transportation, or advertisement of drug paraphernalia.

- (1) **USE OR POSSESSION OF DRUG PARAPHERNALIA.**—It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

§ 6.2

DRUG OFFENSES

6–87

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter; or

(b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

Any person who violates this subsection is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) MANUFACTURE OR DELIVERY OF DRUG PARAPHERNALIA.—It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used:

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this act; or

(b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this act.

Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) DELIVERY OF DRUG PARAPHERNALIA TO A MINOR.—

(a) Any person 18 years of age or over who violates subsection (2) by delivering drug paraphernalia to a person under 18 years of age is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) It is unlawful for any person to sell or otherwise deliver hypodermic syringes, needles, or other objects which may be used, are intended for use, or are designed for use in parenterally injecting substances into the human body to any person under 18 years of age, except that hypodermic syringes, needles, or other such objects may be lawfully dispensed to a person under 18 years

of age by a licensed practitioner, parent, or legal guardian or by a pharmacist pursuant to a valid prescription for same. Any person who violates the provisions of this paragraph is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(4) **TRANSPORTATION OF DRUG PARAPHERNALIA.**— It is unlawful to use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia, knowing or under circumstances in which one reasonably should know that it will be used to transport:

- (a) A controlled substance in violation of this chapter; or
- (b) Contraband as defined in s. 932.701(2)(a)1.

Any person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) **ADVERTISEMENT OF DRUG PARAPHERNALIA.**—It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this subsection is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

History.—s. 3, ch. 80-30; s. 1, ch. 81-149; s. 54, ch. 83-215; s. 1, ch. 85-8; s. 223, ch. 91-224; s. 16, ch. 2000-360.

893.149 Unlawful possession of listed chemical.

(1) It is unlawful for any person to knowingly or intentionally:

- (a) Possess a listed chemical with the intent to unlawfully manufacture a controlled substance;
- (b) Possess or distribute a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to unlawfully manufacture a controlled substance.

(2) Any person who violates this section is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 5, ch. 91-279.

893.15 Rehabilitation.

Any person who violates s. 893.13(6)(a) or (b) relating to possession may, in the discretion of the trial judge, be required to participate in a substance abuse services program approved or regulated by the Department of Health pursuant to the provisions of chapter 397, provided the director of such program approves the placement of the defendant in such program. Such required participation may be imposed in addition to, or in lieu of, any penalty or probation otherwise prescribed by law. However, the total time of such penalty, probation, and program participation shall not exceed the maximum length of sentence possible for the offense.

History.—s. 15, ch. 73-331; s. 46, ch. 91-110; s. 40, ch. 93-39; s. 3, ch. 94-107.

893.16 Assessment for alcohol and other drug abuse programs.

(1) In addition to any fine imposed by law for any criminal offense under this chapter or for any criminal violation of s. 316.193, s. 856.011, s. 856.015, or chapter 562, chapter 567, or chapter 568, the court shall be authorized, pursuant to the requirements of s. 893.13(8)(a), to impose an additional assessment in an amount up to the amount of the fine authorized for the offense. Such additional assessments shall be deposited for the purpose of providing assistance grants to drug abuse treatment or alcohol treatment or education programs as provided in s. 893.165.

(2) All assessments authorized by this section shall be collected by the clerk of court and remitted to the jurisdictional county as described in s. 893.165(2) for deposit into the County Alcohol and Other Drug Abuse Trust Fund or to the Department of Health for deposit into the department's Community Alcohol and Other Drug Abuse Services Grants and Donations Trust Fund pursuant to guidelines and priorities developed by the department. If a County Alcohol and Other Drug Abuse Trust Fund has not been established for any jurisdictional county, assessments collected by the clerk of court shall be remitted to the Department of Health for deposit into the department's Community Alcohol and Other Drug Abuse Services Grants and Donations Trust Fund.

History.—s. 3, ch. 88-381; s. 3, ch. 90-111; s. 2, ch. 93-194; s. 4, ch. 94-107.

893.165 County alcohol and other drug abuse treatment or education trust funds.

(1) Counties in which there is established or in existence a comprehensive alcohol and other drug abuse treatment or education program which meets the standards for qualification of such programs by the Department of Children and Family Services are authorized to establish a County Alcohol and Other Drug Abuse Trust Fund for the purpose of receiving the assessments collected pursuant to s. 893.16 and disbursing assistance grants on an annual basis to such alcohol and other drug abuse treatment or education program.

(2) Assessments collected by the clerks of court pursuant to s. 893.16 shall be remitted to the board of county commissioners of the county in which the indictment was found or the prosecution commenced for payment into the County Alcohol and Other Drug Abuse Trust Fund. The county commissioners shall require a full report from all clerks of county courts and clerks of circuit courts once each month of the amount of assessments imposed by their courts.

(3)(a) No county shall receive assessments collected pursuant to s. 893.16 in an amount exceeding that county's jurisdictional share as described in subsection (2).

(b) Assessments collected by clerks of circuit courts having more than one county in the circuit, for any county in the circuit which does not have a County Alcohol and Other Drug Abuse Trust Fund, shall be remitted to the Department of Children and Family Services, in accordance with administrative rules adopted, for deposit into the department's Community Alcohol and Other Drug Abuse Services Grants and Donations Trust Fund for distribution pursuant to the guidelines and priorities developed by the department.

(4) No assessments shall be remitted to a county until the board of county commissioners has submitted documentation to the court substantiating the establishment of its County Alcohol and Other Drug Abuse Trust Fund.

§ 6.2

DRUG OFFENSES

6-91

(5) If the board of county commissioners chooses to establish a County Alcohol and Other Drug Abuse Trust Fund, the board shall be responsible for the establishment of such fund and its implementation, administration, supervision, and evaluation.

(6) In order to receive assistance grants from the County Alcohol and Other Drug Abuse Trust Fund, county alcohol and other drug abuse prevention, treatment, or education programs shall be designated by the board of county commissioners as the chosen program recipients. Designations shall be made annually, based on success of the programs.

(7) An alcohol and other drug abuse treatment or education program recipient shall, in seeking assistance grants from the County Alcohol and Other Drug Abuse Trust Fund, provide the board of county commissioners with detailed financial information and requests for expenditures.

History.—s. 4, ch. 88-381; s. 3, ch. 93-194; s. 37, ch. 97-271; s. 305, ch. 99-8.

893.20 Continuing criminal enterprise.

(1) Any person who commits three or more felonies under this chapter in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management and who obtains substantial assets or resources from these acts is guilty of engaging in a continuing criminal enterprise.

(2) A person who commits the offense of engaging in a continuing criminal enterprise is guilty of a life felony, punishable pursuant to the sentencing guidelines and by a fine of \$500,000.

(3) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence may not be suspended, deferred, or withheld.

(4) This section does not prohibit separate convictions and sentences for violation of this section and for felony violations of this chapter.

(5) This section must be interpreted in concert with its federal analog, 21 U.S.C. s. 848.

History.—s. 1, ch. 89-145; s. 25, ch. 93-406; s. 24, ch. 97-194.

895.01 Short title.

Sections 895.01–895.06 shall be known as the “Florida RICO (Racketeer Influenced and Corrupt Organization) Act.”

History.—s. 1, ch. 77-334; s. 2, ch. 79-218.

Note.—Former s. 943.46.

895.02 Definitions.

As used in ss. 895.01–895.08, the term:

(1) “Racketeering activity” means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:

1. Section 210.18, relating to evasion of payment of cigarette taxes.
2. Section 403.727(3)(b), relating to environmental control.
3. Section 414.39, relating to public assistance fraud.
4. Section 409.920, relating to Medicaid provider fraud.
5. Section 440.105 or s. 440.106, relating to workers’ compensation.
6. Part IV of chapter 501, relating to telemarketing.
7. Chapter 517, relating to sale of securities and investor protection.
8. Section 550.235, s. 550.3551, or s. 550.3605, relating to dogracing and horseracing.
9. Chapter 550, relating to jai alai frontons.
10. Chapter 552, relating to the manufacture, distribution, and use of explosives.

§ 6.2

DRUG OFFENSES

6–93

11. Chapter 560, relating to money transmitters, if the violation is punishable as a felony.
12. Chapter 562, relating to beverage law enforcement.
13. Section 624.401, relating to transacting insurance without a certificate of authority, s. 624.437(4)(c)1., relating to operating an unauthorized multiple-employer welfare arrangement, or s. 626.902(1)(b), relating to representing or aiding an unauthorized insurer.
14. Section 655.50, relating to reports of currency transactions, when such violation is punishable as a felony.
15. Chapter 687, relating to interest and usurious practices.
16. Section 721.08, s. 721.09, or s. 721.13, relating to real estate timeshare plans.
17. Chapter 782, relating to homicide.
18. Chapter 784, relating to assault and battery.
19. Chapter 787, relating to kidnapping.
20. Chapter 790, relating to weapons and firearms.
21. Section 796.03, s. 796.04, s. 796.05, or s. 796.07, relating to prostitution.
22. Chapter 806, relating to arson.
23. Section 810.02(2)(c), relating to specified burglary of a dwelling or structure.
24. Chapter 812, relating to theft, robbery, and related crimes.
25. Chapter 815, relating to computer-related crimes.
26. Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes.
27. Chapter 825, relating to abuse, neglect, or exploitation of an elderly person or disabled adult.

28. Section 827.071, relating to commercial sexual exploitation of children.
29. Chapter 831, relating to forgery and counterfeiting.
30. Chapter 832, relating to issuance of worthless checks and drafts.
31. Section 836.05, relating to extortion.
32. Chapter 837, relating to perjury.
33. Chapter 838, relating to bribery and misuse of public office.
34. Chapter 843, relating to obstruction of justice.
35. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.
36. Section 849.09, s. 849.14, s. 849.15, s. 849.23, or s. 849.25, relating to gambling.
37. Chapter 874, relating to criminal street gangs.
38. Chapter 893, relating to drug abuse prevention and control.
39. Chapter 896, relating to offenses related to financial transactions.
40. Sections 914.22 and 914.23, relating to tampering with a witness, victim, or informant, and retaliation against a witness, victim, or informant.
41. Sections 918.12 and 918.13, relating to tampering with jurors and evidence.

(b) Any conduct defined as “racketeering activity” under 18 U.S.C. s. 1961(1).

(2) “Unlawful debt” means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted:

§ 6.2

DRUG OFFENSES

6–95

(a) In violation of any one of the following provisions of law:

1. Section 550.235, s. 550.3551, or s. 550.3605, relating to dogracing and horseracing.
2. Chapter 550, relating to jai alai frontons.
3. Chapter 687, relating to interest and usury.
4. Section 849.09, s. 849.14, s. 849.15, s. 849.23, or s. 849.25, relating to gambling.

(b) In gambling activity in violation of federal law or in the business of lending money at a rate usurious under state or federal law.

(3) “Enterprise” means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities. A criminal street gang, as defined in s. 874.03, constitutes an enterprise.

(4) “Pattern of racketeering activity” means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.

(5) “Documentary material” means any book, paper, document, writing, drawing, graph, chart, photograph, phonorecord, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other tangible item.

(6) “RICO lien notice” means the notice described in s. 895.05(12) or in s. 895.07.

(7) “Investigative agency” means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

(8) “Beneficial interest” means any of the following:

(a) The interest of a person as a beneficiary under a trust established pursuant to s. 689.07 or s. 689.071 in which the trustee for the trust holds legal or record title to real property;

(b) The interest of a person as a beneficiary under any other trust arrangement pursuant to which a trustee holds legal or record title to real property for the benefit of such person; or

(c) The interest of a person under any other form of express fiduciary arrangement pursuant to which any other person holds legal or record title to real property for the benefit of such person.

The term “beneficial interest” does not include the interest of a stockholder in a corporation or the interest of a partner in either a general partnership or a limited partnership. A beneficial interest shall be deemed to be located where the real property owned by the trustee is located.

(9) “Real property” means any real property or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property.

(10) “Trustee” means any of the following:

(a) Any person acting as trustee pursuant to a trust established under s. 689.07 or s. 689.071 in which the trustee holds legal or record title to real property.

(b) Any person who holds legal or record title to real property in which any other person has a beneficial interest.

(c) Any successor trustee or trustees to any or all of the foregoing persons.

However, the term “trustee” does not include any person appointed or acting as a personal representative as defined in s. 731.201(25) or appointed or acting as a trustee of any testamentary trust or as a trustee

of any indenture of trust under which any bonds have been or are to be issued.

(11) “Criminal proceeding” means any criminal proceeding commenced by an investigative agency under s. 895.03 or any other provision of the Florida RICO Act.

(12) “Civil proceeding” means any civil proceeding commenced by an investigative agency under s. 895.05 or any other provision of the Florida RICO Act.

History.—s. 2, ch. 77-334; s. 3, ch. 79-218; s. 300, ch. 79-400; s. 1, ch. 81-141; s. 1, ch. 83-65; s. 25, ch. 83-264; s. 2, ch. 84-9; s. 5, ch. 86-277; s. 1, ch. 87-139; s. 5, ch. 89-143; s. 2, ch. 90-246; s. 3, ch. 90-301; s. 13, ch. 91-33; s. 72, ch. 91-282; s. 4, ch. 92-125; s. 4, ch. 92-281; s. 65, ch. 92-348; s. 2, ch. 93-227; s. 106, ch. 93-415; s. 78, ch. 94-209; s. 91, ch. 95-211; s. 9, ch. 95-340; s. 107, ch. 96-175; s. 7, ch. 96-252; s. 5, ch. 96-260; s. 4, ch. 96-280; s. 7, ch. 96-387; s. 43, ch. 96-388; s. 2, ch. 97-78; s. 2, ch. 99-335; s. 17, ch. 2000-360.

Note.—Former s. 943.461.

895.03 Prohibited activities and defense.

(1) It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3).

History.—s. 3, ch. 77-334.

Note.—Former s. 943.462.

895.04 Criminal penalties and alternative fine.

(1) Any person convicted of engaging in activity in violation of the provisions of s. 895.03 is guilty of a felony of the first degree and shall be punished as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) In lieu of a fine otherwise authorized by law, any person convicted of engaging in conduct in violation of the provisions of s. 895.03, through which the person derived pecuniary value, or by which he or she caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed 3 times the gross value gained or 3 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

(3) The court shall hold a hearing to determine the amount of the fine authorized by subsection (2).

(4) For the purposes of subsection (2), “pecuniary value” means:

(a) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else the primary significance of which is economic advantage; or

(b) Any other property or service that has a value in excess of \$100.

History.—s. 4, ch. 77-334; s. 1446, ch. 97-102.

Note.—Former s. 943.463.

895.05 Civil remedies.

(1) Any circuit court may, after making due provision for the rights of innocent persons, enjoin violations of the provisions of s. 895.03 by issuing appropriate orders and judgments, including, but not limited to:

(a) Ordering any defendant to divest himself or herself of any interest in any enterprise, including real property.

§ 6.2

DRUG OFFENSES

6–99

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which the defendant was engaged in violation of the provisions of s. 895.03.

(c) Ordering the dissolution or reorganization of any enterprise.

(d) Ordering the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state.

(e) Ordering the forfeiture of the charter of a corporation organized under the laws of the state, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of s. 895.03 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

(2)(a) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.05 is subject to civil forfeiture to the state.

(b) Upon the entry of a final judgment of forfeiture in favor of the state, the title of the state to the forfeited property shall relate back:

1. In the case of real property or a beneficial interest, to the date of filing of the RICO lien notice in the official records of the county where the real property or beneficial trust is located; if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens under s. 895.07(5)(a) in the official records of the county where the real property or beneficial interest is located; and if no RICO lien notice or notice of lis pendens is filed, then to the date of recording of

the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located.

2. In the case of personal property, to the date the personal property was seized by the investigating agency.

If property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice or after the filing of a civil proceeding or criminal proceeding, whichever is earlier, the investigative agency may, on behalf of the state, institute an action in any circuit court against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding, and the court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the investigative agency in the action. If a civil proceeding is pending, such action shall be filed only in the court where the civil proceeding is pending.

(c) The state shall dispose of all forfeited property as soon as commercially feasible. If property is not exercisable or transferable for value by the state, it shall expire. All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. The proceeds realized from such forfeiture and disposition shall be promptly distributed in accordance with the provisions of s. 895.09.

(3) Property subject to forfeiture under this section may be seized by a law enforcement officer upon court process. Seizure without process may be made if:

(a) The seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant.

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding based upon this section.

(4) In the event of a seizure under subsection (3), a forfeiture proceeding shall be instituted promptly. Property taken or detained under this section shall not be subject to replevin, but is deemed

§ 6.2

DRUG OFFENSES

6-101

to be in the custody of the law enforcement officer making the seizure, subject only to the order of the court. When property is seized under this section, pending forfeiture and final disposition, the law enforcement officer may:

- (a) Place the property under seal.
- (b) Remove the property to a place designated by court.
- (c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(5) The Department of Legal Affairs, any state attorney, or any state agency having jurisdiction over conduct in violation of a provision of this act may institute civil proceedings under this section. In any action brought under this section, the circuit court shall proceed as soon as practicable to the hearing and determination. Pending final determination, the circuit court may at any time enter such injunctions, prohibitions, or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.

(6) Any aggrieved person may institute a proceeding under subsection (1). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(7) The state, including any of its agencies, instrumentalities, subdivisions, or municipalities, if it proves by clear and convincing evidence that it has been injured by reason of any violation of the provisions of s. 895.03, shall have a cause of action for threefold the actual damages sustained and shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation, reasonably incurred. In no event shall punitive damages be awarded. The defendant shall be entitled to recover reasonable

attorneys' fees and court costs upon a finding that the claimant raised a claim which was without substantial factual or legal support.

(a) Either party may demand a trial by jury in any civil action brought pursuant to this subsection.

(b) Any prevailing plaintiff under this subsection or s. 772.104 shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state has in the same property or proceeds.

(8) A final judgment or decree rendered in favor of the state in any criminal proceeding under this act or any other criminal proceeding under state law shall estop the defendant in any subsequent civil action or proceeding under this act or under s. 772.104 as to all matters as to which such judgment or decree would be an estoppel as between the parties.

(9) The Department of Legal Affairs may, upon timely application, intervene in any civil action or proceeding brought under subsection (6) or subsection (7) if he certifies that, in his opinion, the action or proceeding is of general public importance. In such action or proceeding, the state shall be entitled to the same relief as if the Department of Legal Affairs had instituted the action or proceeding.

(10) Notwithstanding any other provision of law, a criminal or civil action or proceeding under this act may be commenced at any time within 5 years after the conduct in violation of a provision of this act terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent, or restrain any violation of the provisions of this act, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsection (6) or subsection (7) which is based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding shall be suspended during the pendency of such prosecution, action, or proceeding and for 2 years following its termination.

(11) The application of one civil remedy under any provision of this act does not preclude the application of any other remedy,

§ 6.2

DRUG OFFENSES

6–103

civil or criminal, under this act or any other provision of law. Civil remedies under this act are supplemental, and not mutually exclusive.

(12)(a) In addition to the authority to file a RICO lien notice set forth in s. 895.07(1), the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney may apply ex parte to a criminal division of a circuit court and, upon petition supported by sworn affidavit, obtain an order authorizing the filing of a RICO lien notice against real property upon a showing of probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.05. If the lien notice authorization is granted, the department shall, after filing the lien notice, forthwith provide notice to the owner of the property by one of the following methods:

1. By serving the notice in the manner provided by law for the service of process.
2. By mailing the notice, postage prepaid, by registered or certified mail to the person to be served at his last known address and evidence of the delivery.
3. If neither of the foregoing can be accomplished, by posting the notice on the premises.

(b) The owner of the property may move the court to discharge the lien, and such motion shall be set for hearing at the earliest possible time.

(c) The court shall discharge the lien if it finds that there is no probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.05 or if it finds that the owner of the property neither knew nor reasonably should have known that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.05.

(d) No testimony presented by the owner of the property at the hearing is admissible against him in any criminal proceeding except in a criminal prosecution for perjury or false statement, nor shall such testimony constitute a waiver of the owner's constitutional right against self-incrimination.

(e) A lien notice secured under the provisions of this subsection is valid for a period of 90 days from the date the court granted authorization, which period may be extended for an additional 90 days by the court for good cause shown, unless a civil proceeding is instituted under this section and a lien notice is filed under s. 895.07, in which event the term of the lien notice is governed by s. 895.08.

(f) The filing of a lien notice, whether or not subsequently discharged or otherwise lifted, shall constitute notice to the owner and knowledge by the owner that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.05, such that lack of such notice and knowledge shall not be a defense in any subsequent civil or criminal proceeding under this chapter.

History.—s. 5, ch. 77-334; s. 301, ch. 79-400; s. 2, ch. 81-141; s. 1, ch. 84-38; s. 5, ch. 84-249; s. 6, ch. 86-277; s. 3, ch. 87-139; s. 5, ch. 90-269; s. 76, ch. 95-211; s. 1447, ch. 97-102.

Note.—Former s. 943.464.

895.055 Distribution of residual funds.

[Repealed by s. 22, ch. 88-381].

895.06 Civil investigative subpoenas.

(1) As used in this section, the term “investigative agency” means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

(2) If, pursuant to the civil enforcement provisions of s. 895.05, an investigative agency has reason to believe that a person or other enterprise has engaged in, or is engaging in, activity in violation of this act, the investigative agency may administer oaths or affirmations, subpoena witnesses or material, and collect evidence.

§ 6.2

DRUG OFFENSES

6–105

(3) The investigative agency may apply ex parte to the circuit court for the circuit in which a subpoenaed person or entity resides, is found, or transacts business for an order directing that the subpoenaed person or entity not disclose the existence of the subpoena to any other person or entity except the subpoenaed person's attorney for a period of 90 days, which time may be extended by the court for good cause shown by the investigative agency. The order shall be served with the subpoena, and the subpoena shall include a reference to the order and a notice to the recipient of the subpoena that disclosure of the existence of the subpoena to any other person or entity in violation of the order may subject the subpoenaed person or entity to punishment for contempt of court. Such an order may be granted by the court only upon a showing:

(a) Of sufficient factual grounds to reasonably indicate a violation of ss. 895.01–895.06;

(b) That the documents or testimony sought appear reasonably calculated to lead to the discovery of admissible evidence; and

(c) Of facts which reasonably indicate that disclosure of the subpoena would hamper or impede the investigation or would result in a flight from prosecution.

(4) If matter that the investigative agency seeks to obtain by the subpoena is located outside the state, the person or enterprise subpoenaed may make such matter available to the investigative agency or its representative for examination at the place where such matter is located. The investigative agency may designate representatives, including officials of the jurisdiction in which the matter is located, to inspect the matter on its behalf and may respond to similar requests from officials of other jurisdictions.

(5) Upon failure of a person or enterprise, without lawful excuse, to obey a subpoena issued under this section or a subpoena issued in the course of a civil proceeding instituted pursuant to s. 895.05, and after reasonable notice to such person or enterprise, the investigative agency may apply to the circuit court in which such civil proceeding is pending or, if no civil proceeding is pending, to the circuit court for the judicial circuit in which such person or enterprise

resides, is found, or transacts business for an order compelling compliance. Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or material after asserting a privilege against self-incrimination to which he is entitled by law shall not have the testimony or material so provided, or evidence derived therefrom, received against him or her in any criminal investigation or proceeding.

(6) A person who fails to obey a court order entered pursuant to this section may be punished for contempt of court.

History.—s. 1, ch. 79-218; s. 2, ch. 84-38; s. 4, ch. 87-139; s. 20, ch. 88-381; s. 1448, ch. 97-102.

Note.—Former s. 943.465.

895.07 RICO lien notice.

(1) Upon the institution of any civil proceeding, the investigative agency, then or at any time during the pendency of the proceeding, may file a RICO lien notice in the official records of any one or more counties. No filing fee or other charge shall be required as a condition for filing the RICO lien notice, and the clerk of the circuit court shall, upon the presentation of a RICO lien notice, immediately record it in the official records.

(2) The RICO lien notice shall be signed by the head of the Department of Legal Affairs or his designee or by a state attorney or his designee. The notice shall be in such form as the Attorney General prescribes and shall set forth the following information:

(a) The name of the person against whom the civil proceeding has been brought. In its discretion, the investigative agency may also name in the RICO lien notice any other aliases, names, or fictitious names under which the person may be known and any corporation, partnership, or other entity that is either controlled or entirely owned by the person.

(b) If known to the investigative agency, the present residence and business addresses of the person named in the RICO lien notice and of the other names set forth in the RICO lien notice.

(c) A reference to the civil proceeding, stating: that a proceeding under the Florida RICO Act has been brought against the

§ 6.2

DRUG OFFENSES

6-107

person named in the RICO lien notice; the name of the county or counties in which the proceeding has been brought; and, if known to the investigative agency at the time of filing the RICO lien notice, the case number of the proceeding.

(d) A statement that the notice is being filed pursuant to the Florida RICO Act.

(e) The name and address of the investigative agency filing the RICO lien notice and the name of the individual signing the RICO notice.

A RICO lien notice shall apply only to one person and, to the extent applicable, any other aliases, names, or fictitious names, including names of corporations, partnerships, or other entities, to the extent permitted in paragraph (a). A separate RICO lien notice shall be filed for each person against whom the investigative agency desires to file a RICO lien notice under this section.

(3) The investigative agency shall, as soon as practicable after the filing of each RICO lien notice, furnish to the person named in the notice either a copy of the recorded notice or a copy of the notice with a notation thereon of the county or counties in which the notice has been recorded. The failure of the investigative agency to furnish a copy of the notice under this subsection shall not invalidate or otherwise affect the notice.

(4) The filing of a RICO lien notice creates, from the time of its filing, a lien in favor of the state on the following property of the person named in the notice and against any other names set forth in the notice:

(a) Any real property situated in the county where the notice is filed then or thereafter owned by the person or under any of the names; and

(b) Any beneficial interest situated in the county where the notice is filed then or thereafter owned by the person or under any of the names.

The lien shall commence and attach as of the time of filing of the RICO lien notice and shall continue thereafter until expiration, termination,

or release of the notice pursuant to s. 895.08. The lien created in favor of the state shall be superior and prior to the interest of any other person in the real property or beneficial interest if the interest is acquired subsequent to the filing of the notice.

(5) In conjunction with any civil proceeding:

(a) The investigative agency may file without prior court order in any county a lis pendens under the provisions of s. 48.23; in such case, any person acquiring an interest in the subject real property or beneficial interest, if the real property or beneficial interest is acquired subsequent to the filing of lis pendens, shall take the interest subject to the civil proceeding and any subsequent judgment of forfeiture.

(b) If a RICO lien notice has been filed, the investigative agency may name as a defendant, in addition to the person named in the notice, any person acquiring an interest in the real property or beneficial interest subsequent to the filing of the notice. If a judgment of forfeiture is entered in the proceeding in favor of the state, the interest of any person in the property that was acquired subsequent to the filing of the notice shall be subject to the notice and judgment of forfeiture.

(6) A trustee who acquires actual knowledge that a RICO lien notice or a civil proceeding or criminal proceeding has been filed against any person for whom he holds legal or record title to real property shall immediately furnish to the investigative agency the following:

(a) The name and address of the person, as known to the trustee.

(b) The name and address, as known to the trustee, of each other person for whose benefit the trustee holds title to the real property.

(c) If requested by the investigative agency, a copy of the trust agreement or other instrument pursuant to which the trustee holds legal or record title to the real property.

Any trustee who fails to comply with the provisions of this subsection is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

§ 6.2

DRUG OFFENSES

6–109

(7) Any trustee who conveys title to real property for which, at the time of the conveyance, a RICO lien notice naming a person who, to the actual knowledge of the trustee, holds a beneficial interest in the trust has been filed in the county where the real property is situated is liable to the state for the greatest of:

(a) The amount of proceeds received directly by the person named in the RICO lien notice as a result of the conveyance;

(b) The amount of proceeds received by the trustee as a result of the conveyance and distributed to the person named in the RICO lien notice; or

(c) The fair market value of the interest of the person named in the RICO lien notice in the real property so conveyed; however, if the trustee conveys the real property and holds the proceeds that would otherwise be paid or distributed to the beneficiary or at the direction of the beneficiary or his designee, the trustee's liability shall not exceed the amount of the proceeds so held for so long as the proceeds are held by the trustee.

(8) The filing of a RICO lien notice shall not constitute a lien on the record title to real property as owned by the trustee except to the extent that the trustee is named in the RICO lien notice. The investigative agency may bring a civil proceeding in any circuit court against the trustee to recover from the trustee the amount set forth in subsection (7), and the state shall also be entitled to recover investigative costs and attorney's fees incurred by the investigative agency.

(9) The filing of a RICO lien notice shall not affect the use to which real property or a beneficial interest owned by the person named in the RICO lien notice may be put or the right of the person to receive any avails, rents, or other proceeds resulting from the use and ownership, but not the sale, of the property until a judgment of forfeiture is entered.

(10)(a) The provisions of this section shall not apply to any conveyance by a trustee pursuant to a court order, unless such court order is entered in an action between the trustee and the beneficiary.

6-110

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

(b) Unless the trustee has actual knowledge that a person owning a beneficial interest in the trust is named in a RICO lien notice or is otherwise a defendant in a civil proceeding, the provisions of this section shall not apply to:

1. Any conveyance by the trustee required under the terms of the trust agreement, which trust agreement is a matter of public record prior to the filing of the RICO lien notice; or
2. Any conveyance by the trustee to all of the persons who own beneficial interests in the trust.

(11) All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons.

History.—s. 3, ch. 81-141; s. 170, ch. 83-216; s. 224, ch. 91-224; s. 1449, ch. 97-102.

895.08 Term of RICO lien notice.

(1) The term of a RICO lien notice shall be for a period of 6 years from the date of filing, unless a renewal RICO lien notice has been filed by the investigative agency; in such case, the term of the renewal RICO lien notice shall be for a period of 6 years from the date of its filing. The investigative agency shall be entitled to only one renewal of the RICO lien notice.

(2) The investigative agency filing a RICO lien notice may release in whole or in part the RICO lien notice or may release any specific real property or beneficial interest from the RICO lien notice upon such terms and conditions as it may determine. A release of a RICO lien notice executed by the investigative agency may be filed in the official records of any county. No charge or fee shall be imposed for the filing of a release of a RICO lien notice.

(3) If no civil proceeding has been instituted by the investigative agency seeking a forfeiture of any property owned by the person named in the RICO lien notice, the acquittal in the criminal proceeding of the person named in the RICO lien notice or the dismissal of the criminal proceeding shall terminate the RICO lien notice and, in such case, the filing of the RICO lien notice shall have no effect. In the event the criminal proceeding has been dismissed or the person named in the RICO lien notice has been

§ 6.2

DRUG OFFENSES

6-111

acquitted in the criminal proceeding, the RICO lien notice shall continue for the duration of the civil proceeding.

(4) If no civil proceeding is then pending against the person named in a RICO lien notice, the person named in the RICO lien notice may institute an action in the county where the notice has been filed against the investigative agency that filed the notice seeking a release or extinguishment of the notice. In such case:

(a) The court shall, upon the motion of such person, immediately enter an order setting a date for hearing, which date shall be not less than 5 or more than 10 days after the suit has been filed, and the order along with a copy of the complaint shall be served on the investigative agency within 3 days after the institution of the suit. At the hearing, the court shall take evidence on the issue of whether any real property or beneficial interest owned by such person is covered by the RICO lien notice or is otherwise subject to forfeiture under the Florida RICO Act; if such person shows by a preponderance of the evidence that the RICO lien notice is not applicable to him or that any real property or beneficial interest owned by him is not subject to forfeiture under the Florida RICO Act, the court shall enter a judgment extinguishing the RICO lien notice or releasing the real property or beneficial interest from the RICO lien notice.

(b) The court shall immediately enter its order releasing from the RICO lien notice any specific real property or beneficial interest if a sale of such real property or beneficial interest is pending and the filing of the notice prevents the sale of the property or interest; however, the proceeds resulting from the sale of such real property or beneficial interest shall be deposited into the registry of the court, subject to the further order of the court.

(c) At the hearing set forth in paragraph (a), the court may release any real property or beneficial interest from the RICO lien notice, upon the posting by such person of such security as is equal to the value of the real property or beneficial interest owned by such person.

(5) In the event a civil proceeding is pending against a person named in a RICO lien notice, the court upon motion by such person may grant the relief set forth herein.

History.—s. 4, ch. 81-141; s. 1450, ch. 97-102.

895.09 Disposition of funds obtained through forfeiture proceedings.¹

(1) A court entering a judgment of forfeiture in a proceeding brought pursuant to s. 895.05 shall retain jurisdiction to direct the distribution of any cash or of any cash proceeds realized from the forfeiture and disposition of the property. The court shall direct the distribution of the funds in the following order of priority:

(a) Any statutory fees to which the clerk of the court may be entitled.

(b) Any claims against the property by persons who have previously been judicially determined to be innocent persons, pursuant to the provisions of s. 895.05(2)(c), and whose interests are preserved from forfeiture by the court and not otherwise satisfied. Such claims may include any claim by a person appointed by the court as receiver pending litigation.

(c) Any claim by the Board of Trustees of the Internal Improvement Trust Fund on behalf of the Forfeited Property Trust Fund or the Land Acquisition Trust Fund pursuant to s. 253.03(13), not including administrative costs of the Department of Environmental Protection previously paid directly from the Forfeited Property Trust Fund in accordance with legislative appropriation.

(2)(a) Following satisfaction of all valid claims under subsection (1), 25 percent of the remainder of the funds obtained in the forfeiture proceedings pursuant to s. 895.05 shall be deposited as provided in paragraph (b) into the appropriate trust fund of the Department of Legal Affairs or state attorney's office which filed the civil forfeiture action; 25 percent shall be deposited as provided in paragraph (c) into the law enforcement trust fund of the investigating law enforcement agency conducting the investigation which resulted in or significantly contributed to the forfeiture of the property; 25 percent shall be deposited as provided in paragraph (d) in the Substance Abuse Trust Fund of the Department of Children and Family Services; and the remaining 25 percent shall be deposited in the Forfeited Property Trust Fund

of the Department of Environmental Protection. When a forfeiture action is filed by the Department of Legal Affairs or a state attorney, the court entering the judgment of forfeiture shall, taking into account the overall effort and contribution to the investigation and forfeiture action by the agencies that filed the action, make a pro rata apportionment among such agencies of the funds available for distribution to the agencies filing the action as provided in this section. If multiple investigating law enforcement agencies have contributed to the forfeiture of the property, the court which entered the judgment of forfeiture shall, taking into account the overall effort and contribution of the agencies to the investigation and forfeiture action, make a pro rata apportionment among such investigating law enforcement agencies of the funds available for distribution to the investigating agencies as provided in this section.

(b) If a forfeiture action is filed by the Attorney General, any funds obtained by the Department of Legal Affairs by reason of paragraph (a) shall be deposited in the Legal Affairs Revolving Trust Fund as established by s. 16.53 and may be expended for the purposes and in the manner authorized in that section. If a forfeiture action is filed by a state attorney, any funds obtained by the state attorney's office by reason of paragraph (a) shall be deposited in the State Attorney RICO Trust Fund as established by s. 27.345 and may be expended for the purposes and in the manner authorized in that section. In addition, any funds that are distributed pursuant to this section to an agency filing a forfeiture action may be used to pay the costs of investigations of violations of this chapter and the criminal prosecutions and civil actions related thereto. Such costs may include all taxable costs; costs of protecting, maintaining, and forfeiting the property; employees' base salaries and compensation for overtime; and such other costs as are directly attributable to the investigation, prosecution, or civil action.

(c) Any funds distributed to an investigating law enforcement agency under paragraph (a) shall be deposited in the special law enforcement trust fund established for that agency pursuant to s. 932.7055 and expended for the purposes and in the manner authorized in that section. In addition, any funds distributed to

an investigating law enforcement agency pursuant to this section may be used to pay the costs of investigations of violations of this chapter and the criminal prosecutions and civil actions related thereto, pursuant to s. 932.7055. Such costs may include all taxable costs; costs of protecting, maintaining, and forfeiting the property; employees' base salaries and compensation for overtime; and such other costs directly attributable to the investigation, prosecution, or civil action.

(d) The Department of Children and Family Services shall, in accordance with chapter 397, distribute funds obtained by it pursuant to paragraph (a) to public and private nonprofit organizations licensed by the department to provide substance abuse treatment and rehabilitation centers or substance abuse prevention and youth orientation programs in the service district in which the final order of forfeiture is entered by the court.

(e) On a quarterly basis, any excess funds, including interest, over \$1 million deposited in the Forfeited Property Trust Fund of the Department of Environmental Protection in accordance with paragraph (a) shall be deposited in the Substance Abuse Trust Fund of the Department of Children and Family Services.

(3) Nothing in this section shall be construed to limit the authority of an entity that files a forfeiture action to compromise a claim for forfeiture; however, any proceeds arising from a compromise or from the sale of property obtained in a compromise shall be distributed in the manner provided in subsections (1) and (2).

(4) Pending the final distribution of the cash or cash proceeds pursuant to this section, the court may authorize the cash or cash proceeds to be deposited in the court registry or in a qualified public depository.

(5) For purposes of this section, the term "cash or cash proceeds" includes, but is not limited to, damages or penalties or any other monetary payment, the monetary proceeds from property forfeited to the state pursuant to s. 895.05, or any payment made by any defendant by reason of any decree or settlement in any action filed pursuant to s. 895.05.

§ 6.2

DRUG OFFENSES

6-115

History.—s. 1, ch. 84-249; s. 2, ch. 85-306; s. 7, ch. 86-277; s. 21, ch. 88-381; ss. 1, 6, ch. 89-102; ss. 8, 9, ch. 92-54; s. 41, ch. 93-39; s. 16, ch. 94-316; s. 478, ch. 94-356; s. 2, ch. 98-389; s. 306, ch. 99-8.

¹**Note.**—Section 18, ch. 94-316, provides for applicability to distributions of proceeds relative to the Legal Affairs Revolving Trust Fund occurring on or after July 1, 1994.

932.701 Short title; definitions.

(1) Sections 932.701–932.707 shall be known and may be cited as the “Florida Contraband Forfeiture Act.”

(2) As used in the Florida Contraband Forfeiture Act:

(a) “Contraband article” means:

1. Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893, if the totality of the facts presented by the state is clearly sufficient to meet the state’s burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband article can be traced to a specific narcotics transaction.

2. Any gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, was attempted, or intended to be used in violation of the gambling laws of the state.

3. Any equipment, liquid or solid, which was being used, is being used, was attempted to be used, or intended to be used in violation of the beverage or tobacco laws of the state.

4. Any motor fuel upon which the motor fuel tax has not been paid as required by law.

5. Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used

or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

6. Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

7. Any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, currency, or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c).

8. Any motor vehicle offered for sale in violation of s. 320.28.

9. Any motor vehicle used during the course of committing an offense in violation of s. 322.34(9)(a).

(b) “Bona fide lienholder” means the holder of a lien perfected pursuant to applicable law.

(c) “Promptly proceed” means to file the complaint within 45 days after seizure.

(d) “Complaint” is a petition for forfeiture filed in the civil division of the circuit court by the seizing agency requesting the court to issue a judgment of forfeiture.

(e) “Person entitled to notice” means any owner, entity, bona fide lienholder, or person in possession of the property subject to forfeiture when seized, who is known to the seizing agency after a diligent search and inquiry.

(f) “Adversarial preliminary hearing” means a hearing in which the seizing agency is required to establish probable cause

§ 6.2

DRUG OFFENSES

6-117

that the property subject to forfeiture was used in violation of the Florida Contraband Forfeiture Act.

(g) “Forfeiture proceeding” means a hearing or trial in which the court or jury determines whether the subject property shall be forfeited.

(h) “Claimant” means any party who has proprietary interest in property subject to forfeiture and has standing to challenge such forfeiture, including owners, registered owners, bona fide lienholders, and titleholders.

History.—ss. 1, 2, ch. 74-385; s. 1, ch. 80-68; s. 1, ch. 89-148; s. 1, ch. 92-54; s. 1, ch. 95-265; s. 31, ch. 96-247; s. 2, ch. 99-234; s. 69, ch. 99-248.

Note.—Former s. 943.41.

932.702 Unlawful to transport, conceal, or possess contraband articles or to acquire real or personal property with contraband proceeds; use of vessel, motor vehicle, aircraft, other personal property, or real property.

It is unlawful:

(1) To transport, carry, or convey any contraband article in, upon, or by means of any vessel, motor vehicle, or aircraft.

(2) To conceal or possess any contraband article.

(3) To use any vessel, motor vehicle, aircraft, other personal property, or real property to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(4) To conceal, or possess, or use any contraband article as an instrumentality in the commission of or in aiding or abetting in the commission of any felony or violation of the Florida Contraband Forfeiture Act.

(5) To acquire real or personal property by the use of proceeds obtained in violation of the Florida Contraband Forfeiture Act.

History.—s. 2, ch. 74-385; s. 2, ch. 80-68; s. 2, ch. 89-148; s. 2, ch. 92-54; s. 2, ch. 95-265.

Note.—Former s. 943.42.

932.703 Forfeiture of contraband article; exceptions.

(1)(a) Any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which any violation of the Florida Contraband Forfeiture Act has taken or is taking place, may be seized and shall be forfeited subject to the provisions of the Florida Contraband Forfeiture Act.

(b) Notwithstanding any other provision of the Florida Contraband Forfeiture Act, except the provisions of paragraph (a), contraband articles set forth in s. 932.701(2)(a)7. used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which any violation of the Florida Contraband Forfeiture Act has taken or is taking place, shall be seized and shall be forfeited subject to the provisions of the Florida Contraband Forfeiture Act.

(c) All rights to, interest in, and title to contraband articles used in violation of s. 932.702 shall immediately vest in the seizing law enforcement agency upon seizure.

(d) The seizing agency may not use the seized property for any purpose until the rights to, interest in, and title to the seized property are perfected in accordance with the Florida Contraband Forfeiture Act. This section does not prohibit use or operation necessary for reasonable maintenance of seized property. Reasonable efforts shall be made to maintain seized property in such a manner as to minimize loss of value.

(2)(a) Personal property may be seized at the time of the violation or subsequent to the violation, if the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act. Seizing agencies shall make a diligent effort to notify the person entitled to notice of the seizure. Notice provided by certified mail must be mailed within 5 working days after the seizure and must state

§ 6.2

DRUG OFFENSES

6-119

that a person entitled to notice may request an adversarial preliminary hearing within 15 days after receiving such notice. When a postseizure, adversarial preliminary hearing as provided in this section is desired, a request must be made in writing by certified mail, return receipt requested, to the seizing agency. The seizing agency shall set and notice the hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter.

(b) Real property may not be seized or restrained, other than by *lis pendens*, subsequent to a violation of the Florida Contraband Forfeiture Act until the persons entitled to notice are afforded the opportunity to attend the preseizure adversarial preliminary hearing. A *lis pendens* may be obtained by any method authorized by law. Notice of the adversarial preliminary hearing shall be by certified mail, return receipt requested. The purpose of the adversarial preliminary hearing is to determine whether probable cause exists to believe that such property has been used in violation of the Florida Contraband Forfeiture Act. The seizing agency shall make a diligent effort to notify any person entitled to notice of the seizure. The preseizure adversarial preliminary hearing provided herein shall be held within 10 days of the filing of the *lis pendens* or as soon as practicable.

(c) When an adversarial preliminary hearing is held, the court shall review the verified affidavit and any other supporting documents and take any testimony to determine whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used in violation of the Florida Contraband Forfeiture Act. If probable cause is established, the court shall authorize the seizure or continued seizure of the subject contraband. A copy of the findings of the court shall be provided to any person entitled to notice.

(d) If the court determines that probable cause exists to believe that such property was used in violation of the Florida Contraband Forfeiture Act, the court shall order the property restrained by the least restrictive means to protect against disposal, waste, or continued illegal use of such property pending disposition of the forfeiture proceeding. The court may order the claimant to post

a bond or other adequate security equivalent to the value of the property.

(3) Neither replevin nor any other action to recover any interest in such property shall be maintained in any court, except as provided in this act; however, such action may be maintained if forfeiture proceedings are not initiated within 45 days after the date of seizure. However, if good cause is shown, the court may extend the aforementioned prohibition to 60 days.

(4) In any incident in which possession of any contraband article defined in s. 932.701(2)(a) constitutes a felony, the vessel, motor vehicle, aircraft, other personal property, or real property in or on which such contraband article is located at the time of seizure shall be contraband subject to forfeiture. It shall be presumed in the manner provided in s. 90.302(2) that the vessel, motor vehicle, aircraft, other personal property, or real property in which or on which such contraband article is located at the time of seizure is being used or was attempted or intended to be used in a manner to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of a contraband article defined in s. 932.701(2).

(5) The court shall order the forfeiture of any other property of a claimant, excluding lienholders, up to the value of any property subject to forfeiture under this section if any of the property described in this section:

- (a) Cannot be located;
- (b) Has been transferred to, sold to, or deposited with, a third party;
- (c) Has been placed beyond the jurisdiction of the court;
- (d) Has been substantially diminished in value by any act or omission of the person in possession of the property; or
- (e) Has been commingled with any property which cannot be divided without difficulty.

(6)(a) Property may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a

§ 6.2

DRUG OFFENSES

6-121

preponderance of the evidence that the owner either knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity.

(b) A bona fide lienholder's interest that has been perfected in the manner prescribed by law prior to the seizure may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that the lienholder had actual knowledge, at the time the lien was made, that the property was being employed or was likely to be employed in criminal activity. If a lienholder's interest is not subject to forfeiture under the requirements of this section, such interest shall be preserved by the court by ordering the lienholder's interest to be paid as provided in s. 932.7055.

(c) Property titled or registered between husband and wife jointly by the use of the conjunctives "and," "and/or," or "or," in the manner prescribed by law prior to the seizure, may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that the coowner either knew or had reason to know, after reasonable inquiry, that such property was employed or was likely to be employed in criminal activity.

(d) A vehicle that is rented or leased from a company engaged in the business of renting or leasing vehicles, which vehicle was rented or leased in the manner prescribed by law prior to the seizure, may not be forfeited under the Florida Contraband Forfeiture Act, and no fine, penalty, or administrative charge, other than reasonable and customary charges for towing and storage, shall be imposed by any governmental agency on the company which rented or leased the vehicle, unless the seizing agency establishes by preponderance of the evidence that the renter or lessor had actual knowledge, at the time the vehicle was rented or leased, that the vehicle was being employed or was likely to be employed in criminal activity. When a vehicle that is rented or leased from a company engaged in the business of renting or leasing vehicles is seized under the Florida Contraband Forfeiture Act, upon learning the address or phone number of the company,

the seizing law enforcement agency shall, as soon as practicable, inform the company that the vehicle has been seized and is available for the company to take possession upon payment of the reasonable and customary charges for towing and storage.

(7) Any interest in, title to, or right to property titled or registered jointly by the use of the conjunctives “and,” “and/or,” or “or” held by a coowner, other than property held jointly between husband and wife, may not be forfeited unless the seizing agency establishes by a preponderance of the evidence that the coowner either knew, or had reason to know, after reasonable inquiry, that the property was employed or was likely to be employed in criminal activity. When the interests of each culpable coowner are forfeited, any remaining coowners shall be afforded the opportunity to purchase the forfeited interest in, title to, or right to the property from the seizing law enforcement agency. If any remaining coowner does not purchase such interest, the seizing agency may hold the property in coownership, sell its interest in the property, liquidate its interest in the property, or dispose of its interest in the property in any other reasonable manner.

(8) It is an affirmative defense to a forfeiture proceeding that the nexus between the property sought to be forfeited and the commission of any underlying violation was incidental or entirely accidental. The value of the property sought to be forfeited in proportion to any other factors must not be considered in any determination as to this affirmative defense.

History.—s. 3, ch. 74-385; s. 3, ch. 80-68; s. 496, ch. 81-259; s. 1, ch. 85-316; s. 3, ch. 89-148; s. 3, ch. 92-54; s. 3, ch. 95-265; s. 32, ch. 96-247; s. 3, ch. 99-234; ss. 70, 71, ch. 99-248.

Note.—Former s. 943.43.

932.704 Forfeiture proceedings.

(1) It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders and to authorize such law enforcement agencies to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized

§ 6.2

DRUG OFFENSES

6–123

purposes. The potential for obtaining revenues from forfeitures must not override fundamental considerations such as public safety, the safety of law enforcement officers, or the investigation and prosecution of criminal activity. It is also the policy of this state that law enforcement agencies ensure that, in all seizures made under the Florida Contraband Forfeiture Act, their officers adhere to federal and state constitutional limitations regarding an individual's right to be free from unreasonable searches and seizures, including, but not limited to, the illegal use of stops based on a pretext, coercive-consent searches, or a search based solely upon an individual's race or ethnicity.

(2) In each judicial circuit, all civil forfeiture cases shall be heard before a circuit court judge of the civil division, if a civil division has been established. The Florida Rules of Civil Procedure shall govern forfeiture proceedings under the Florida Contraband Forfeiture Act unless otherwise specified under the Florida Contraband Forfeiture Act.

(3) Any trial on the ultimate issue of forfeiture shall be decided by a jury, unless such right is waived by the claimant through a written waiver or on the record before the court conducting the forfeiture proceeding.

(4) The seizing agency shall promptly proceed against the contraband article by filing a complaint in the circuit court within the jurisdiction where the seizure or the offense occurred.

(5)(a) The complaint shall be styled, "In RE: FORFEITURE OF _____" (followed by the name or description of the property). The complaint shall contain a brief jurisdictional statement, a description of the subject matter of the proceeding, and a statement of the facts sufficient to state a cause of action that would support a final judgment of forfeiture. The complaint must be accompanied by a verified supporting affidavit.

(b) If no person entitled to notice requests an adversarial preliminary hearing, as provided in s. 932.703(2)(a), the court, upon receipt of the complaint, shall review the complaint and the verified supporting affidavit to determine whether there was probable cause for the seizure. Upon a finding of probable cause, the court shall enter an order showing the probable cause finding.

(c) The court shall require any claimant who desires to contest the forfeiture to file and serve upon the attorney representing the seizing agency any responsive pleadings and affirmative defenses within 20 days after receipt of the complaint and probable cause finding.

(6)(a) If the property is required by law to be titled or registered, or if the owner of the property is known in fact to the seizing agency, or if the seized property is subject to a perfected security interest in accordance with the Uniform Commercial Code, chapter 679, the attorney for the seizing agency shall serve the forfeiture complaint as an original service of process under the Florida Rules of Civil Procedure and other applicable law to each person having an ownership or security interest in the property. The seizing agency shall also publish, in accordance with chapter 50, notice of the forfeiture complaint once each week for 2 consecutive weeks in a newspaper of general circulation, as defined in s. 165.031, in the county where the seizure occurred.

(b) The complaint must, in addition to stating that which is required by s. 932.703(2)(a) and (b), as appropriate, describe the property; state the county, place, and date of seizure; state the name of the law enforcement agency holding the seized property; and state the name of the court in which the complaint will be filed.

(c) The seizing agency shall be obligated to make a diligent search and inquiry as to the owner of the subject property, and if, after such diligent search and inquiry, the seizing agency is unable to ascertain any person entitled to notice, the actual notice requirements by mail shall not be applicable.

(7) When the claimant and the seizing law enforcement agency agree to settle the forfeiture action prior to the conclusion of the forfeiture proceeding, the settlement agreement shall be reviewed, unless such review is waived by the claimant in writing, by the court or a mediator or arbitrator agreed upon by the claimant and the seizing law enforcement agency. If the claimant is unrepresented, the settlement agreement must include a provision that the claimant has freely and voluntarily agreed to enter into the settlement without benefit of counsel.

§ 6.2

DRUG OFFENSES

6-125

(8) Upon clear and convincing evidence that the contraband article was being used in violation of the Florida Contraband Forfeiture Act, the court shall order the seized property forfeited to the seizing law enforcement agency. The final order of forfeiture by the court shall perfect in the law enforcement agency right, title, and interest in and to such property, subject only to the rights and interests of bona fide lienholders, and shall relate back to the date of seizure.

(9)(a) When the claimant prevails at the conclusion of the forfeiture proceeding, if the seizing agency decides not to appeal, the seized property shall be released immediately to the person entitled to possession of the property as determined by the court. Under such circumstances, the seizing agency shall not assess any towing charges, storage fees, administrative costs, or maintenance costs against the claimant with respect to the seized property or the forfeiture proceeding.

(b) When the claimant prevails at the conclusion of the forfeiture proceeding, any decision to appeal must be made by the chief administrative official of the seizing agency, or his or her designee. The trial court shall require the seizing agency to pay to the claimant the reasonable loss of value of the seized property when the claimant prevails at trial or on appeal and the seizing agency retained the seized property during the trial or appellate process. The trial court shall also require the seizing agency to pay to the claimant any loss of income directly attributed to the continued seizure of income-producing property during the trial or appellate process. If the claimant prevails on appeal, the seizing agency shall immediately release the seized property to the person entitled to possession of the property as determined by the court, pay any cost as assessed by the court, and may not assess any towing charges, storage fees, administrative costs, or maintenance costs against the claimant with respect to the seized property or the forfeiture proceeding.

(10) The court shall award reasonable attorney's fees and costs, up to a limit of \$1,000, to the claimant at the close of the adversarial preliminary hearing if the court makes a finding of no probable cause. When the claimant prevails, at the close of forfeiture proceedings and any appeal, the court shall award reasonable trial attorney's

fees and costs to the claimant if the court finds that the seizing agency has not proceeded at any stage of the proceedings in good faith or that the seizing agency's action which precipitated the forfeiture proceedings was a gross abuse of the agency's discretion. The court may order the seizing agency to pay the awarded attorney's fees and costs from the appropriate contraband forfeiture trust fund. Nothing in this subsection precludes any party from electing to seek attorney's fees and costs under chapter 57 or other applicable law.

(11)(a) The Department of Law Enforcement, in consultation with the Florida Sheriffs Association and the Florida Police Chiefs Association, shall develop guidelines and training procedures to be used by state and local law enforcement agencies and state attorneys in implementing the Florida Contraband Forfeiture Act. Each state or local law enforcement agency that files civil forfeiture actions under the Florida Contraband Forfeiture Act shall file, by December 31, 1995, a certificate signed by the agency head or his or her designee, which represents that the agency's policies and procedures are in compliance with the guidelines. Each state or local law enforcement agency that seizes property for the purpose of forfeiture shall periodically review seizures of assets made by the agency's law enforcement officers, settlements, and forfeiture proceedings initiated by the agency, to determine whether such seizures, settlements, and forfeitures comply with the Florida Contraband Forfeiture Act and the guidelines adopted under this subsection. The determination of whether an agency will file a civil forfeiture action must be the sole responsibility of the head of the agency or his or her designee.

(b) The determination of whether to seize currency must be made by supervisory personnel. The agency's legal counsel must be notified as soon as possible.

History.—s. 4, ch. 74-385; s. 4, ch. 80-68; s. 1, ch. 82-239; s. 2, ch. 85-304; s. 2, ch. 85-316; s. 1, ch. 87-77; s. 4, ch. 89-148; s. 2, ch. 89-307; s. 6, ch. 90-17; s. 4, ch. 92-54; s. 4, ch. 95-265.

Note.—Former s. 943.44.

932.705 Law Enforcement Trust Fund; Department of Highway Safety and Motor Vehicles deposits.

(1)(a) There is created the Law Enforcement Trust Fund into which the Department of Highway and Safety and Motor Vehicles may deposit revenues received as a result of criminal proceedings or forfeiture proceedings, other than revenues deposited into the department's Federal Law Enforcement Trust Fund under paragraph (b).

(b)1. There is created the Federal Law Enforcement Trust Fund into which the Department of Highway and Safety and Motor Vehicles may deposit receipts and revenues received as a result of federal, criminal, administrative, or civil forfeiture proceedings and receipts and revenues received from federal asset-sharing programs. The trust fund is exempt from the service charges imposed by s. 215.20.

2. Notwithstanding the provisions of s. 216.301, and pursuant to s. 216.351, any balance in the trust fund at the end of the fiscal year shall remain in the trust fund at the end of that year and shall be available for carrying out the purposes of the trust fund.

3. Pursuant to the provisions of s. 19(f)(2), Art. III of the State Constitution, the trust fund shall, unless terminated sooner, be terminated on July 1, 2002.

(2) Each trust fund listed in subsection (1) which is subject to termination pursuant to the provisions of s. 19(f)(2), Art. III of the State Constitution shall be reviewed prior to its scheduled termination as provided in s. 215.3206(1) and (2).

History.—s. 2, ch. 87-401; s. 1, ch. 98-389.

932.7055 Disposition of liens and forfeited property.

(1) When a seizing agency obtains a final judgment granting forfeiture of real property or personal property, it may elect to:

(a) Retain the property for the agency's use;

(b) Sell the property at public auction or by sealed bid to the highest bidder, except for real property which should be sold in

6-128

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

a commercially reasonable manner after appraisal by listing on the market; or

(c) Salvage, trade, or transfer the property to any public or nonprofit organization.

(2) If the forfeited property is subject to a lien preserved by the court as provided in s. 932.703(6)(b), the agency shall:

(a) Sell the property with the proceeds being used towards satisfaction of any liens; or

(b) Have the lien satisfied prior to taking any action authorized by subsection (1).

(3) The proceeds from the sale of forfeited property shall be disbursed in the following priority:

(a) Payment of the balance due on any lien preserved by the court in the forfeiture proceedings.

(b) Payment of the cost incurred by the seizing agency in connection with the storage, maintenance, security, and forfeiture of such property.

(c) Payment of court costs incurred in the forfeiture proceeding.

(4)(a) If the seizing agency is a county or municipal agency, the remaining proceeds shall be deposited in a special law enforcement trust fund established by the board of county commissioners or the governing body of the municipality. Such proceeds and interest earned therefrom shall be used for school resource officer, crime prevention, safe neighborhood, drug abuse education and prevention programs, or for other law enforcement purposes, which include defraying the cost of protracted or complex investigations, providing additional equipment or expertise and providing matching funds to obtain federal grants. The proceeds and interest may not be used to meet normal operating expenses of the law enforcement agency.

(b) These funds may be expended upon request by the sheriff to the board of county commissioners or by the chief of police

§ 6.2

DRUG OFFENSES

6-129

to the governing body of the municipality, accompanied by a written certification that the request complies with the provisions of this subsection, and only upon appropriation to the sheriff's office or police department by the board of county commissioners or the governing body of the municipality.

(c) An agency or organization, other than the seizing agency, that wishes to receive such funds shall apply to the sheriff or chief of police for an appropriation and its application shall be accompanied by a written certification that the moneys will be used for an authorized purpose. Such requests for expenditures shall include a statement describing anticipated recurring costs for the agency for subsequent fiscal years. An agency or organization that receives money pursuant to this subsection shall provide an accounting for such moneys and shall furnish the same reports as an agency of the county or municipality that receives public funds. Such funds may be expended in accordance with the following procedures:

1. Such funds may be used only for school resource officer, crime prevention, safe neighborhood, drug abuse education, or drug prevention programs or such other law enforcement purposes as the board of county commissioners or governing body of the municipality deems appropriate.
2. Such funds shall not be a source of revenue to meet normal operating needs of the law enforcement agency.
3. After July 1, 1992, and during every fiscal year thereafter, any local law enforcement agency that acquires at least \$15,000 pursuant to the Florida Contraband Forfeiture Act within a fiscal year must expend or donate no less than 15 percent of such proceeds for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program(s). The local law enforcement agency has the discretion to determine which program(s) will receive the designated proceeds.

Notwithstanding the drug abuse education, drug treatment, drug prevention, crime prevention, safe neighborhood, or school resource officer minimum expenditures or donations, the sheriff and the board

of county commissioners or the chief of police and the governing body of the municipality may agree to expend or donate such funds over a period of years if the expenditure or donation of such minimum amount in any given fiscal year would exceed the needs of the county or municipality for such program(s). Nothing in this section precludes the expenditure or donation of forfeiture proceeds in excess of the minimum amounts established herein.

(5) If the seizing agency is a state agency, all remaining proceeds shall be deposited into the General Revenue Fund. However, if the seizing agency is:

(a) The Department of Law Enforcement, the proceeds accrued pursuant to the provisions of the Florida Contraband Forfeiture Act shall be deposited into the Forfeiture and Investigative Support Trust Fund as provided in s. 943.362 or into the Department's Federal Law Enforcement Trust Fund as provided in s. 943.365, as applicable.

(b) The Department of Environmental Protection, the proceeds accrued pursuant to the provisions of the Florida Contraband Forfeiture Act shall be deposited into the Forfeited Property Trust Fund or into the department's Federal Law Enforcement Trust Fund as provided in s. 20.2553, as applicable.

(c) The Division of Alcoholic Beverages and Tobacco, the proceeds accrued pursuant to the Florida Contraband Forfeiture Act shall be deposited into the Alcoholic Beverage and Tobacco Trust Fund or into the department's Federal Law Enforcement Trust Fund as provided in s. 561.027 as applicable.

(d) The Department of Highway Safety and Motor Vehicles, the proceeds accrued pursuant to the Florida Contraband Forfeiture Act shall be deposited into the Department of Highway Safety and Motor Vehicles Law Enforcement Trust Fund as provided in s. 932.075(1)(b), as applicable..

(e) The Fish and Wildlife Conservation Commission, the proceeds accrued pursuant to the provisions of the Florida Contraband Forfeiture Act shall be deposited into the State Game Trust Fund as provided in ss. 373.73, 373.9901, and 372.9904, into the Marine Resources Conservation Trust Fund as provided in s.

§ 6.2

DRUG OFFENSES

6-131

370.061, or into the commission's federal Law Enforcement Trust Fund as provided in s. 372.107, as applicable.

(f) A state attorney's office acting within its judicial circuit, the proceeds accrued pursuant to the provisions of the Florida Contraband Forfeiture Act shall be deposited into the State Attorney's Forfeiture and Investigative Support Trust Fund to be used for the investigation of crime and prosecution of criminals within the judicial circuit.

(g) A school board security agency employing law enforcement officers, the proceeds accrued pursuant to the provisions of the Florida Contraband Forfeiture Act shall be deposited into the School Board Law Enforcement Trust Fund.

(h) One of the State University System police departments acting within the jurisdiction of its employing state university, the proceeds accrued pursuant to the provisions of the Florida Contraband Forfeiture Act shall be deposited into that state university's special law enforcement trust fund.

(i) The Department of Agriculture and Consumer Services, the proceeds accrued pursuant to the provisions of the Florida Contraband Forfeiture Act shall be deposited into the Agricultural Law Enforcement Trust Fund or into the department's Federal Law Enforcement Trust Fund as provided in s. 570-205 as applicable..

(j) The Department of Military Affairs, the proceeds accrued from federal forfeiture sharing pursuant to 21 U.S.C. ss. 881(e)(1)(A) and (3), 18 U.S.C. s. 981(e)(2), and 19 U.S.C. s. 1616a shall be deposited into the Armory Board Trust Fund and used for purposes authorized by such federal provisions based on the department's budgetary authority or into the department's Federal Law Enforcement Trust Fund as provided in s. 250.175, as applicable.

(k) The Department of Transportation, the proceeds accrued pursuant to the provisions of the Florida Contraband Forfeiture Act shall be deposited into the State Transportation Trust Fund to be used for purposes of drug interdiction or into the department's Federal Law Enforcement Trust Fund as provided in s. 339.082, as applicable.

(6) If more than one law enforcement agency is acting substantially to effect the forfeiture, the court having jurisdiction over the forfeiture proceedings shall, upon motion, equitably distribute all proceeds and other property among the seizing agencies.

(7) Upon the sale of any motor vehicle, vessel, aircraft, real property, or other property requiring a title, the appropriate agency shall issue a title certificate to the purchaser. Upon the request of any law enforcement agency which elects to retain titled property after forfeiture, the appropriate state agency shall issue a title certificate for such property to said law enforcement agency.

(8)(a) Every law enforcement agency shall submit semiannual reports to the Department of Law Enforcement indicating whether the agency has seized or forfeited property under the Florida Contraband Forfeiture Act. Any law enforcement agency receiving or expending forfeited property or proceeds from the sale of forfeited property in accordance with the Florida Contraband Forfeiture Act shall submit completed semiannual reports, by April 10, and October 10, documenting the receipts and expenditures, on forms promulgated by the Department of Law Enforcement, to the entity which has budgetary authority over such agency and to the Department of Law Enforcement. The semiannual report shall specify the type, approximate value, any court case number, type of offense, disposition of the property received, and the amount of any proceeds received or expended.

(b) The Department of Law Enforcement shall submit an annual report to the criminal justice committees of the House of Representatives and of the Senate compiling the information and data related in the semiannual reports submitted by the law enforcement agencies. The annual report shall also contain a list of law enforcement agencies which have failed to meet the reporting requirements and a summary of any action which has been taken against the noncomplying agency by the Office of the Comptroller.

(c) Neither the law enforcement agency nor the entity having budgetary control over the law enforcement agency shall anticipate future forfeitures or proceeds therefrom in the adoption and approval of the budget for the law enforcement agency.

History.—s. 5, ch. 92-54; s. 2, ch. 92-290; s. 21, ch. 94-265; s. 479, ch. 94-356; s. 5, ch. 95-265; s. 72, ch. 96-321; s. 41, ch. 96-418.; s. 2, ch. 98-387; s. 3, ch. 98-389; s. 4, ch. 98-390; s. 5, ch. 98-391; s. 2, ch. 98-392; s. 2, ch. 98-393; s. 2, ch. 98-394; s. 61, ch. 99-245; s. 2, ch. 2000-147.

932.706 Forfeiture training requirements.

The Criminal Justice Standards and Training Commission shall develop a standardized course of training for basic recruits and continuing education which shall be designed to develop proficiency in the seizure and forfeiture of property under the Florida Contraband Forfeiture Act. Such course of training and continuing education shall be developed and implemented by December 1, 1995. The curriculum for the course of training and continuing education must include, but is not limited to, racial and ethnic sensitivity and a review of cases in this state which involve searches and seizures, the use of drug-courier profiles by law enforcement agencies, and the use of an order to stop based on a pretext.

History.—s. 6, ch. 92-54; s. 6, ch. 95-265.

932.707 Penalty for noncompliance with reporting requirements.

Any seizing agency which fails to comply with the reporting requirements as described in s. 932.7055(8)(a), is subject to a civil fine of \$5,000 payable to the General Revenue Fund. However, such agency will not be subject to the fine if, within 60 days of receipt of written notification from the Department of Law Enforcement of the noncompliance with the reporting requirements of the Florida Contraband Forfeiture Act, the agency substantially complies with said requirements. The Department of Law Enforcement shall submit any substantial noncompliance to the Office of the Comptroller, which shall be responsible for the enforcement of this section.

History.—s. 7, ch. 92-54.

777.011 Principal in first degree.

Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and

may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

History.—s. 1, ch. 57-310; s. 11, ch. 74-383; s. 1194, ch. 97-102.

Note.—Former s. 776.011.

777.04 Attempts, solicitation, and conspiracy.

(1) A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt, ranked for purposes of sentencing as provided in subsection (4). Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.

(2) A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation, ranked for purposes of sentencing as provided in subsection (4).

(3) A person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in subsection (4).

(4)(a) Except as otherwise provided in ss. 828.125(2), 849.25(4), 893.135(5), and 921.0012, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is ranked for purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944 one level below the ranking under s. 921.0012 or s. 921.0013 of the offense attempted, solicited, or conspired to. If the criminal attempt, criminal solicitation, or criminal conspiracy is of an offense ranked in level 1 or level 2 under s. 921.0012 or s. 921.0013, such offense is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

§ 6.2

DRUG OFFENSES

6–135

(b) If the offense attempted, solicited, or conspired to is a capital felony, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) Except as otherwise provided in s. 893.135(5), if the offense attempted, solicited, or conspired to is a life felony or a felony of the first degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) Except as otherwise provided in s. 828.125(2) or s. 849.25(4), if the offense attempted, solicited, or conspired to is a:

1. Felony of the second degree;
2. Burglary that is a felony of the third degree; or
3. Felony of the third degree ranked in level 3, 4, 5, 6, 7, 8, 9, or 10 under s. 921.0012 or s. 921.0013,

the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(e) Except as otherwise provided in s. 849.25(4) or paragraph (d), if the offense attempted, solicited, or conspired to is a felony of the third degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(f) If the offense attempted, solicited, or conspired to is a misdemeanor of the first or second degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(5) It is a defense to a charge of criminal attempt, criminal solicitation, or criminal conspiracy that, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant:

- (a) Abandoned his or her attempt to commit the offense or otherwise prevented its commission;
- (b) After soliciting another person to commit an offense, persuaded such other person not to do so or otherwise prevented commission of the offense; or
- (c) After conspiring with one or more persons to commit an offense, persuaded such persons not to do so or otherwise prevented commission of the offense.

History.—s. 8, sub-ch. 11, ch. 1637, 1868; RS 2594; GS 3517; RGS 5403; CGL 7544; s. 701, ch. 71-136; s. 1, ch. 72-245; s. 1, ch. 73-142; s. 12, ch. 74-383; s. 5, ch. 75-298; s. 1, ch. 83-98; s. 2, ch. 86-50; s. 170, ch. 91-224; s. 4, ch. 93-406; s. 14, ch. 95-184; s. 1195, ch. 97-102; s. 17, ch. 97-194.

Note.—Former s. 776.04.

775.0121 Continuous revision cycle.

The Legislature shall conduct a systematic and continuing study of the laws relating to the public safety system for the purposes of resolving inconsistencies; removing redundancies and unnecessary repetitions; improving clarity and facilitating correct and proper interpretation; maintaining adequate and appropriate definitional bases; clearly establishing elements of crimes; ensuring that criminal penalties are uniformly applicable; addressing judicial holdings; and providing appropriate and efficient arrangement and placement of provisions of law relating to public safety. The Legislature shall conduct its study of the laws on an 8-year cycle, as follows:

- (1) Criminal penalties, 1998. The study of criminal penalties must include a review of the feasibility of a single criminal fines, fees, and costs collection mechanism.
- (2) Justice process, 1999.
- (3) Law enforcement, 2000.
- (4) Corrections, 2001.
- (5) Prevention, intervention, and substance abuse, 2002.
- (6) Justice information, 2003.
- (7) Community punishment and victim services, 2004.

§ 6.2

DRUG OFFENSES

6-137

(8) Juvenile justice, 2005.

History.—s. 1, ch. 96-388.

775.08 Classes and definitions of offenses.

When used in the laws of this state:

(1) The term “felony” shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in a state penitentiary. “State penitentiary” shall include state correctional facilities. A person shall be imprisoned in the state penitentiary for each sentence which, except an extended term, exceeds 1 year.

(2) The term “misdemeanor” shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by a term of imprisonment in a county correctional facility, except an extended term, not in excess of 1 year. The term “misdemeanor” shall not mean a conviction for any noncriminal traffic violation of any provision of chapter 316 or any municipal or county ordinance.

(3) The term “noncriminal violation” shall mean any offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by no other penalty than a fine, forfeiture, or other civil penalty. A noncriminal violation does not constitute a crime, and conviction for a noncriminal violation shall not give rise to any legal disability based on a criminal offense. The term “noncriminal violation” shall not mean any conviction for any violation of any municipal or county ordinance. Nothing contained in this code shall repeal or change the penalty for a violation of any municipal or county ordinance.

(4) The term “crime” shall mean a felony or misdemeanor.

History.—s. 1(11), ch. 1637, 1868; RS 2352; GS 3176; RGS 5006; CGL 7105; s. 1, ch. 71-136; s. 4, ch. 74-383; s. 1, ch. 75-298; s. 1, ch. 88-196.

775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.

¹(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

²(3) A person who has been convicted of any other designated felony may be punished as follows:

(a)1. For a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30.

2. For a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.

3. For a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

§ 6.2

DRUG OFFENSES

6–139

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

(5) Any person who has been convicted of a noncriminal violation may not be sentenced to a term of imprisonment nor to any other punishment more severe than a fine, forfeiture, or other civil penalty, except as provided in chapter 316 or by ordinance of any city or county.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law, except as provided in subsection (1).

(7) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

(8)(a) The sentencing guidelines that were effective October 1, 1983, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after October 1, 1983, and before January 1, 1994, and to all felonies, except capital felonies and life felonies, committed before October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions.

(b) The 1994 sentencing guidelines, that were effective January 1, 1994, and any revisions thereto, apply to all felonies, except capital felonies, committed on or after January 1, 1994 and before October 1, 1995

(c) The 1995 sentencing guidelines that were effective October 1, 1995, and any revisions thereto, apply to all felonies, except

capital felonies, committed on or after October 1, 1995, and before October 1, 1998.

(d) The Criminal Punishment Code applies to all felonies, except capital felonies, committed on or after October 1, 1998. Any revision to the Criminal Punishment Code applies to sentencing for all felonies, except capital felonies, committed on or after the effective date of the revision.

(e) Felonies, except capital felonies, with continuing dates of enterprise shall be sentenced under the sentencing guidelines of the Criminal Punishment Code in effect on the beginning date of the criminal activity.

(9)(a)1. “Prison releasee reoffender means any defendant who commits, or attempts to commit:

- a. Treason;
- b. Murder;
- c. Manslaughter;
- d. Sexual battery;
- e. Carjacking;
- f. Home-invasion robbery;
- g. Robbery;
- h. Arson;
- i. Kidnapping;
- j. Aggravated assault with a deadly weapon;
- k. Aggravated battery;
- l. Aggravated stalking;
- m. Aircraft piracy;l
- n. Unlawful throwing, placing, or discharging of a destructive device or bomb;

§ 6.2

DRUG OFFENSES

6–141

- o. Any felony that involves the use or threat of physical force or violence against an individual;
- p. Armed burglary;
- q. Burglary of an occupied structure or dwelling; or
- r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071;

within three years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.

2. “Prison releasee reoffender” also means any defendant who commits or attempts to commit any offense listed in subparagraph (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor.

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

- a. For a felony punishable by life, by a term of imprisonment for life;
- b. For a felony of the first degree, by a term of imprisonment of 30 years;
- c. For a felony of the second degree, by a term of imprisonment of 15 years; and
- d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only on expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced

under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the president of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request for at least a 10-year period.

(10) The purpose of this section is to provide uniform punishment for those crimes made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

History.—s. 3, ch. 71-136; ss. 1, 2, ch. 72-118; s. 2, ch. 72-724; s. 5, ch. 74-383; s. 1, ch. 77-174; s. 1, ch. 83-87; s. 1, ch. 94-228; s. 16, ch. 95-184; s. 4, ch. 95-294; s. 2, ch. 97-239; s. 2, ch. 98-3; s. 10, ch. 98-204; s. 2, ch. 99-188; s. 3, ch. 2000-246.

¹Note.—Section 4, ch. 95-294, provides for applicability to sentencing for offenses committed on or after October 1, 1995.

²Note.—Section 16, ch. 95-184, provides for applicability to sentencing for offenses committed on or after July 1, 1995.

775.0823 Violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges.¹

Any provision of law to the contrary notwithstanding, the Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer, as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); against any state attorney elected pursuant to s. 27.01 or assistant state attorney appointed under s. 27.181; or against any justice or judge of a court described in Art. V of the State Constitution, which offense arises out of or in the scope of the officer's duty as a law enforcement or correctional officer, the state attorney's or assistant state attorney's duty as a prosecutor or investigator, or the justice's or judge's duty as a judicial officer, as follows:

- (1) For murder in the first degree as described in s. 782.04(1), if the death sentence is not imposed, a sentence of imprisonment for life without eligibility for release.
- (2) For attempted murder in the first degree as described in s. 782.04(1), a sentence pursuant to the Criminal Punishment Code.
- (3) For murder in the second degree as described in s. 782.04(2) and (3), a sentence pursuant to the Criminal Punishment Code.
- (4) For attempted murder in the second degree as described in s. 782.04(2) and (3), a sentence pursuant to the Criminal Punishment Code.
- (5) For murder in the third degree as described in s. 782.04(4), a sentence pursuant to the Criminal Punishment Code.
- (6) For attempted murder in the third degree as described in s. 782.04(4), a sentence pursuant to the Criminal Punishment Code.
- (7) For manslaughter as described in s. 782.07 during the commission of a crime, a sentence pursuant to the Criminal Punishment Code.
- (8) For kidnapping as described in s. 787.01, a sentence pursuant to the Criminal Punishment Code.

(9) For aggravated battery as described in s. 784.045, a sentence pursuant to the Criminal Punishment Code.

(10) For aggravated assault as described in s. 784.021, a sentence pursuant to the Criminal Punishment Code.

Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

History.—s. 3, ch. 89-100; s. 1, ch. 90-77; s. 16, ch. 93-406; s. 17, ch. 95-184; s. 11, ch. 97-194; s. 5, ch. 98-417.

775.083 Fines.

(1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in s. 775.082; when specifically authorized by statute, he may be sentenced to pay a fine in lieu of any punishment described in s. 775.082. A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations shall not exceed:

(a) \$15,000, when the conviction is of a life felony.

(b) \$10,000, when the conviction is of a felony of the first or second degree.

(c) \$5,000, when the conviction is of a felony of the third degree.

(d) \$1,000, when the conviction is of a misdemeanor of the first degree.

(e) \$500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation.

(f) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

(g) Any higher amount specifically authorized by statute.

§ 6.2

DRUG OFFENSES

6–145

If a defendant is unable to pay a fine, the court may defer payment of the fine to a date certain.

(2)(a) A county may adopt an ordinance imposing, in addition to any other fine, penalty, or cost imposed by subsection (1) or any other provision of law, a fine upon any person who, with respect to a charge, indictment, or prosecution commenced in that county, pleads guilty or nolo contendere to, or is convicted of or adjudicated delinquent for, a felony, a misdemeanor, or a criminal traffic offense under state law, or a violation of any municipal or county ordinance if the violation constitutes a misdemeanor under state law.

(b) The fine is \$50 for a felony and \$20 for any other offense. When the defendant enters the plea or is convicted or adjudicated, in a court in that county, the court may order the defendant to pay such fine if the court finds that the defendant has the ability to pay the fine and that the defendant would not be prevented thereby from being rehabilitated or making restitution.

(c) The clerk of the court shall collect and deposit the fines in an appropriate county account for disbursement for the purposes provided in this subsection.

(d) A county that imposes the additional fines authorized under this subsection shall account for the fines separately from other county funds, as crime prevention funds. The county, in consultation with the sheriff, must expend such fines for the costs of collecting the fines and for crime prevention programs in the county, including safe neighborhood programs under ss. 163.501–163.523.

(3) The purpose of this section is to provide uniform penalty authorization for criminal offenses and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

History.—s. 4, ch. 71-136; s. 6, ch. 74-383; s. 1, ch. 77-97; s. 1, ch. 77-174; s. 1, ch. 96-408; s. 1810, ch. 97-102.

938.17 County delinquency prevention.

(1) A county may adopt a mandatory cost to be assessed in specific cases by incorporating by reference the provisions of this

section in a county ordinance. Prior to the adoption of the county ordinance, the sheriff's office of the county must be a partner in a written agreement with the Department of Juvenile Justice to participate in a juvenile assessment center or with the district school board to participate in a suspension program.

(2) (2) In counties in which the sheriff's office is a partner in a juvenile justice assessment center pursuant to s. 39.0471, or a partner in a suspension program developed in conjunction with the district school board in the county of the sheriff's jurisdiction, the court shall assess court costs of \$3 per case, in addition to any other authorized cost or fine, on every person who, with respect to a charge, indictment, prosecution commenced, or petition of delinquency filed in that county or circuit, pleads guilty, nolo contendere to, or is convicted of, or adjudicated delinquent for, or has an adjudication withheld for, a felony or misdemeanor, or a criminal traffic offense or handicapped parking violation under state law, or a violation of any municipal or county ordinance, if the violation constitutes a misdemeanor under state law.

(3)(a) The clerks of the county and circuit court, in a county where the sheriff's office is a partner in an assessment center or suspension program as specified in subsection (1), shall collect and deposit the assessments collected pursuant to this section in an appropriate, designated account established by the clerk of the court, for disbursement to the sheriff as needed for the implementation and operation of an assessment center or suspension program.

(b) The clerk of the circuit and county court shall withhold 5 percent of the assessments each court collects pursuant to this section, for the costs of administering the collection of assessments under this section.

(c) Assessments collected by clerks of the circuit courts comprised of more than one county shall remit the funds collected pursuant to this section to the county in which the offense at issue was committed for deposit and disbursement according to this section.

(d) Any other funds the sheriff's office obtains for the implementation or operation of an assessment center or suspension

§ 6.2

DRUG OFFENSES

6-147

program may be deposited into the designated account for disbursement to the sheriff as needed.

(4) A sheriff's office that receives the cost assessments established in subsection (1) shall account for all funds that have been deposited into the designated account by August 1 annually in a written report to the county juvenile justice council if funds are used for assessment centers, and to the district school board if funds are used for suspension programs.

History.—s. 1, ch. 96-382; s. 15, ch. 97-271; s. 1, ch. 98-207; s. 55, ch. 98-280; s. 11, ch. 2000-135.

Notes.— Former s. 775.0833.

775.0835 Fines; surcharges; Crimes Compensation Trust Fund.

(1) When any person pleads guilty or nolo contendere to, or is convicted of, any felony or misdemeanor under the laws of this state which resulted in the injury or death of another person, the court may, if it finds that the defendant has the present ability to pay the fine and finds that the impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare, in addition to any other penalty, order the defendant to pay a fine, commensurate with the offense committed and with the probable impact upon the victim, but not to exceed \$10,000. The fine shall be deposited in the Crimes Compensation Trust Fund.

(2) The additional \$50 obligation created by s. 983.03 shall be collected, and \$49 of each \$50 collected shall be credited to the Crimes Compensation Trust Fund, prior to any fine or surcharge authorized by this chapter. These costs are considered assessed unless specifically waived by the court. If the court does not order these costs, it shall state on the record, in detail, the reasons therefor.

History.—ss. 2, 3, ch. 77-452; s. 20, ch. 80-146; s. 2, ch. 83-319; s. 8, ch. 85-326; s. 12, ch. 91-23; s. 2, ch. 93-9; s. 18, ch. 94-342; s. 6, ch. 97-271.

775.0836 Fines; surcharges in cases in which victim is handicapped or elderly.

(1) In addition to any fine prescribed by law for any criminal offense or any county or municipal ordinance, when any victim of

such criminal offense or any county or municipal ordinance violation is handicapped or elderly, as defined in s. 426.002, there is hereby assessed an additional 10-percent surcharge on such fine, which surcharge shall be imposed by all county and circuit courts, and collected by the clerk of the court together with such fine. The surcharge shall be deposited in the General Revenue Fund.

(2) The surcharges imposed by this section apply only in counties containing housing projects as defined in 1this chapter.

History.—s. 5, ch. 84-250; s. 9, ch. 87-155; s. 49, ch. 93-120.

¹Note.—The words “this chapter” refer to ch. 87-155.

775.084 Violent career criminals; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory minimum prison terms.

(1) As used in this act:

(a) “Habitual felony offender” means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(a), if it finds that:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.

2. The felony for which the defendant is to be sentenced was committed:

a. While the defendant was serving a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense; or

b. Within 5 years of the date of the conviction of the defendant’s last prior felony or other qualified offense, or within 5 years of the defendant’s release from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

§ 6.2

DRUG OFFENSES

6–149

3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance.

4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.

5. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

¹(b) “Habitual violent felony offender” means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(b), if it finds that:

1. The defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:

- a. Arson;
- b. Sexual battery;
- c. Robbery;
- d. Kidnapping;
- e. Aggravated child abuse;
- f. Aggravated abuse of an elderly person or disabled adult;
- g. Aggravated assault with a deadly weapon;
- h. Murder;
- i. Manslaughter;
- j. Aggravated manslaughter of an elderly person or disabled adult;
- k. Aggravated manslaughter of a child;

6–150

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

1. Unlawful throwing, placing, or discharging of a destructive device or bomb;

m. Armed burglary;

n. Aggravated battery; or

o. Aggravated stalking.

2. The felony for which the defendant is to be sentenced was committed:

a. While the defendant was serving a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony; or

b. Within 5 years of the date of the conviction of the last prior enumerated felony, or within 5 years of the defendant's release from a prison sentence or other commitment imposed as a result of a prior conviction for an enumerated felony, whichever is later.

3. The defendant has not received a pardon on the ground of innocence for any crime that is necessary for the operation of this paragraph.

4. A conviction of a crime necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

(c) "Three-time violent felony offender" means a defendant for whom the court must impose a mandatory minimum term of imprisonment, as provided in paragraph (4)(c), if it finds that:

1. The defendant has previously been convicted as an adult two or more times of a felony, or an attempt to commit a felony, and two or more of such convictions were for committing, or attempting to commit, any of the following offenses or combination thereof:

a. Arson;

b. Sexual battery;

c. Robbery;

§ 6.2

DRUG OFFENSES

6-151

- d. Kidnapping;
 - e. Aggravated child abuse;
 - f. Aggravated abuse of an elderly person or disabled adult;
 - g. Aggravated assault with a deadly weapon;
 - h. Murder;
 - i. Manslaughter;
 - j. Aggravated manslaughter of an elderly person or disabled adult;
 - k. Aggravated manslaughter of a child;
 - l. Unlawful throwing, placing, or discharging of a destructive device or bomb;
 - m. Armed burglary;
 - n. Aggravated battery;
 - o. Aggravated stalking.
 - p. Home invasion/robbery;
 - q. Carjacking; or
 - r. An offense which is in violation of a law of any other jurisdiction if the elements of the offense are substantially similar to the elements of any felony offense enumerated in sub-subparagraphs a.-q., or an attempt to commit any such felony offense.
2. The felony for which the defendant is to be sentenced is one of the felonies enumerated in sub-subparagraphs 1.a.-q. and was committed:
- a. While the defendant was serving a prison sentence or other sentence imposed as a result of a prior conviction for any offense enumerated in sub-subparagraphs 1.a.-r.; or
 - b. Within 5 years after the date of conviction of the last prior offense enumerated in sub-subparagraphs 1.a.-r., or

within 5 years after the defendant's release from a prison sentence, probation, community control, or other sentence imposed as a result of a prior conviction for any offense enumerated in sub-subparagraphs 1.a-r., whichever is later.

3. The defendant has not received a pardon on ground of innocence for any crime that is necessary for the operation of this paragraph.

4. A conviction of a crime necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

(d) "Violent career criminal" means a defendant for whom the court must impose imprisonment pursuant to paragraph (4) (d), if it finds that:

1. The defendant has previously been convicted as an adult three or more times for an offense in this state or other qualified offense that is:

- a. Any forcible felony, as described in s. 776.08;
- b. Aggravated stalking, as described in s. 784.048(3) and (4);
- c. Aggravated child abuse, as described in s. 827.03(2);
- d. Aggravated abuse of an elderly person or disabled adult, as described in s. 825.102(2);
- e. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, as described in s. 800.04;
- f. Escape, as described in s. 944.40; or
- g. A felony violation of chapter 790 involving the use or possession of a firearm.

2. The defendant has been incarcerated in a state prison or a federal prison.

§ 6.2

DRUG OFFENSES

6–153

3. The primary felony offense for which the defendant is to be sentenced is a felony enumerated in subparagraph 1. and was committed on or after October 1, 1995, and:

a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for an enumerated felony; or

b. Within 5 years after the conviction of the last prior enumerated felony, or within 5 years after the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole, or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for an enumerated felony, whichever is later.

4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.

5. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

(e) “Qualified offense” means any offense, substantially similar in elements and penalties to an offense in this state, which is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction, that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

(2) For the purposes of this section, the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction.

(3)(a) In a separate proceeding, the court shall determine if the defendant is a habitual felony offender or a habitual violent felony offender. The procedure shall be as follows:

1. The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a habitual felony offender or a habitual violent felony offender.

2. Written notice shall be served on the defendant and the defendant's attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.

3. Except as provided in subparagraph 1., all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

4. Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

5. For the purpose of identification of a habitual felony offender or a habitual violent felony offender, the court shall fingerprint the defendant pursuant to s. 921.241.

6. For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment pursuant to this section unless the court finds that such sentence is not necessary for the protection of the public. If the court finds that it is not necessary for the protection of the public to sentence the defendant as a habitual felony offender or a habitual violent felony offender, the court shall provide written reasons; a written transcript of orally stated reasons is permissible, if filed by the court within 7 days after the date of sentencing. Each month, the court shall submit to the Office of Economic and Demographic Research of the Legislature the written reasons or transcripts in each case in which the court

§ 6.2

DRUG OFFENSES

6–155

determines not to sentence a defendant as a habitual felony offender or a habitual violent felony offender as provided in this subparagraph.

(b) In a separate proceeding, the court shall determine if the defendant is a three-time violent felony offender. The procedure shall be as follows:

1. The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a three-time violent felony offender.

2. Written notice shall be served on the defendant and the defendant's attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.

3. Except as provided in subparagraph 1., all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

4. Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

5. For the purpose of identification of a three-time violent felony offender, the court shall fingerprint the defendant pursuant to s. 921.241.

6. For an offense committed on or after the effective date of this act, if the state attorney pursues a three-time violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a three-time violent felony offender, subject to imprisonment pursuant to this section as provided in paragraph (4)(c).

(c) In a separate proceeding, the court shall determine whether the defendant is a violent career criminal with respect to a primary

offense committed on or after October 1, 1995. The procedure shall be as follows:

1. Written notice shall be served on the defendant and the defendant's attorney a sufficient time prior to the entry of a plea or prior to imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.
2. All evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.
3. Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable only as provided in paragraph (d).
4. For the purpose of identification, the court shall fingerprint the defendant pursuant to s. 921.241.
5. For an offense committed on or after October 1, 1995, if the state attorney pursues a violent career criminal sanction against the defendant and court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a violent career criminal, subject to imprisonment pursuant to this section unless the court finds that such sentence is not necessary for the protection of the public. If the court finds that it is not necessary for the protection of the public to sentence the defendant as a violent career criminal, the court shall provide written reasons; a written transcript of orally stated reasons is permissible, if filed by the court within 7 days after the date of sentencing. Each month, the court shall submit to the Office of Economic and Demographic Research of the Legislature the written reasons or transcripts in each case in which the court determines not to sentence a defendant as a violent career criminal as provided in this subparagraph.

(d)1. A person sentenced under paragraph (4)(d) as a violent career criminal has the right of direct appeal, and either the state or the defendant may petition the trial court to vacate an illegal

§ 6.2

DRUG OFFENSES

6-157

sentence at any time. However, the determination of the trial court to impose or not to impose a violent career criminal sentence is presumed appropriate and no petition or motion for collateral or other postconviction relief may be considered based on an allegation either by the state or the defendant that such sentence is inappropriate, inadequate, or excessive.

2. It is the intent of the Legislature that, with respect to both direct appeal and collateral review of violent career criminal sentences, all claims of error or illegality be raised at the first opportunity and that no claim should be filed more than 2 years after the judgment and sentence became final, unless it is established that the basis for the claim could not have been ascertained at the time by the exercise of due diligence. Technical violations and mistakes at trials and sentencing proceedings involving violent career criminals that do not affect due process or fundamental fairness are not appealable by either the state or the defendant.

3. It is the intent of the Legislature that no funds, resources, or employees of the state or its political subdivisions be used, directly or indirectly, in appellate or collateral proceedings based on violent career criminal sentencing, except when such use is constitutionally or statutorily mandated.

(4)(a) The court, in conformity with the procedure established in paragraph (3)(a), may sentence the habitual felony offender as follows:

1. In the case of a life felony or a felony of the first degree, for life.
2. In the case of a felony of the second degree, for a term of years not exceeding 30.
3. In the case of a felony of the third degree, for a term of years not exceeding 10.

(b) The court, in conformity with the procedure established in paragraph (3)(a), may sentence the habitual violent felony offender as follows:

1. In the case of a life felony or a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.

2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.

3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

(c)1. The court, in conformity with the procedure established in paragraph (3)(b), must sentence the three-time violent felony offender to a mandatory minimum term of imprisonment, as follows:

a. In the case of a felony punishable by life, to a term of imprisonment for life;

b. In the case of a felony of the first degree, to a term of imprisonment of 30 years;

c. In the case of a felony of the second degree, to a term of imprisonment of 15 years; or

d. In the case of a felony of the third degree, to a term of imprisonment of 5 years.

2. Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law.

(d) The court, in conformity with the procedure established in paragraph (3)(c), shall sentence the violent career criminal as follows:

1. In the case of a life felony or a felony of the first degree, for life.

2. In the case of a felony of the second degree, for a term of years not exceeding 40, with a mandatory minimum term of 30 years' imprisonment.

§ 6.2

DRUG OFFENSES

6-159

3. In the case of a felony of the third degree, for a term of years exceeding 15, with a mandatory minimum term of 10 years' imprisonment.

(e) If the court finds, pursuant to paragraph (3)(a) or paragraph (3)(c), that it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony offender, or a violent career criminal, with respect to an offense committed on or after October 1, 1995, sentence shall be imposed without regard to this section.

(f) At any time when it appears to the court that the defendant is eligible for sentencing under this section, the court shall make that determination as provided in paragraph (3)(a), paragraph (3)(b), or paragraph (3)(c).

(g) A sentence imposed under this section shall not be increased after such imposition.

(h) A sentence imposed under this section is not subject to s. 921.002.

(i) The provisions of this section do not apply to capital felonies, and a sentence authorized under this section does not preclude the imposition of the death penalty for a capital felony.

(j) The provisions of s. 947.1405 shall apply to persons sentenced as habitual felony offenders and persons sentenced as habitual violent felony offenders.

(k)1. A defendant sentenced under this section as a habitual felony offender, a habitual violent felony offender, or a violent career criminal is eligible for gain-time granted by the Department of Corrections as provided in s. 944.275(4)(b).

2. For an offense committed on or after October 1, 1995, a defendant sentenced under this section as a violent career criminal is not eligible for any form of discretionary early release, other than pardon or executive clemency, or conditional medical release granted pursuant to s. 947.149.

3. For an offense committed on or after July 1, 1999, a defendant sentenced under this section as a three-time violent

felony offender shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release.

(5) In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

(6) The purpose of this section is to provide uniform punishment for those crimes made punishable under this section, and to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

History.—s. 5, ch. 71-136; s. 7, ch. 74-383; s. 1, ch. 75-116; s. 2, ch. 75-298; s. 1, ch. 77-174; s. 6, ch. 88-131; s. 1, ch. 89-280; s. 2, ch. 93-406; s. 2, ch. 95-182; s. 8, ch. 95-195; s. 14, ch. 96-322; s. 44, ch. 96-388; s. 12, ch. 97-78; s. 12, ch. 97-194; s. 11, ch. 98-204; s. 3, ch. 99-188; s. 3, ch. 99-201, ch. 2000-246.

¹Note.—Section 23, ch. 95-195, provides for applicability to offenses committed on or after July 1, 1995.

775.08401 Habitual offenders and habitual violent felony offenders; violent career criminals; eligibility criteria.

(1) The state attorney in each judicial circuit shall adopt uniform criteria to be used when deciding to pursue:

(a) Habitual felony offender or habitual violent felony offender sanctions; or

(b) With respect to an offense committed on or after October 1, 1995, violent career criminal sanctions.

The criteria for each circuit shall be kept on file by the Florida Prosecuting Attorneys Association, Inc.

(2) The criteria shall be designed to ensure fair and impartial application of s. 775.084.

(3)(a) A deviation from this criteria must be explained in writing, signed by the state attorney, and placed in the case file maintained by the state attorney.

§ 6.2

DRUG OFFENSES

6-161

(b) On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after October 1, 1995, to the president of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information for at least a 10-year period.

(4) A deviation from the adopted criteria is not subject to appellate review.

History.—s. 3, ch. 93-406; s. 3, ch. 95-182.

775.0841 Legislative findings and intent.

The Legislature finds a substantial and disproportionate number of serious crimes are committed in Florida by a relatively small number of repeat and violent felony offenders, commonly known as career criminals. The Legislature further finds that priority should be given to the investigation, apprehension, and prosecution of career criminals in the use of law enforcement resources and to the incarceration of career criminals in the use of available prison space. The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorneys' offices to investigate, apprehend, and prosecute career criminals and to incarcerate them for extended terms; and, in the case of violent career criminals, such extended terms must include substantial mandatory minimum terms of imprisonment.

History.—s. 3, ch. 88-131; s. 4, ch. 95-182.

775.0842 Persons subject to career criminal prosecution efforts.

A person who is under arrest for the commission, attempted commission, or conspiracy to commit any felony in this state shall be the subject of career criminal prosecution efforts provided that such person qualifies as a habitual felony offender, a habitual violent felony offender, or a violent career criminal, under s. 775.084.

History.—s. 4, ch. 88-131; s. 2, ch. 89-280; s. 5, ch. 95-182; s. 46, ch. 96-388.

775.0843 Policies to be adopted for career criminal cases.

(1) Criminal justice agencies shall employ enhanced law enforcement management efforts and resources for the investigation,

apprehension, and prosecution of career criminals. Each state attorney, sheriff, and the police chief of each municipality shall provide for or participate in a career criminal prosecution program to coordinate the efforts contemplated by this section and ss. 775.0841 and 775.0842. Enhanced law enforcement efforts and resources include, but are not limited to:

(a) Assignment of highly qualified investigators and prosecutors to career criminal cases.

(b) Significant reduction of caseloads for investigators and prosecutors assigned to career criminal cases.

(c) Coordination with federal, state, and local criminal justice agencies to facilitate the collection and dissemination of criminal investigative and intelligence information relating to those persons meeting the criteria of a career criminal.

(2) Each state attorney's office shall establish a career criminal prosecution unit and adopt and implement policies based on the following guidelines:

(a) All reasonable prosecutorial efforts shall be made to resist the pretrial release of a charged defendant meeting career criminal criteria.

(b) A plea of guilty or a trial conviction shall be sought on each offense charged in the accusatory pleadings against an individual meeting career criminal criteria.

(c) All reasonable prosecutorial efforts shall be made to reduce the time between arrest and disposition of charges against an individual meeting career criminal criteria.

(d) All reasonable prosecutorial efforts shall be made to persuade the court to impose the most severe sanction authorized upon a person convicted after prosecution as a career criminal.

(3) This section does not prohibit a plea agreement in the interest of justice when there are codefendants and the prosecuting attorney determines that the information or testimony of the defendant making the agreement is necessary for the conviction of one or more of the other codefendants. The court may condition its acceptance

§ 6.2

DRUG OFFENSES

6–163

of such plea agreement on the provision of such information or testimony by such defendant.

(4) Law enforcement agencies shall employ enhanced law enforcement management efforts and resources in the investigation, apprehension, and prosecution of career criminals. Enhanced law enforcement efforts and resources include, but are not limited to:

(a) Crime analysis, consisting of the timely collection and study of local crime data to:

1. Identify evolving or existing crime patterns involving career criminals.
2. Provide investigative leads.
3. Isolate and identify geographical areas or population groups experiencing severe crime problems in order to improve crime prevention efforts.
4. Provide supporting data for improved allocation of over-all law enforcement agency resources.

(b) Improved management of investigative operations involving use of information resulting from crime analysis, which may include participation in multijurisdictional investigative and mutual-aid units and measures to increase continuity of investigative efforts from the initial response through the arrest and prosecution of the offender.

(5) Each career criminal apprehension program shall concentrate on the identification and arrest of career criminals and the support of subsequent prosecution. The determination of which suspected felony offenders shall be the subject of career criminal apprehension efforts shall be made in accordance with written target selection criteria selected by the individual law enforcement agency and state attorney consistent with the provisions of this section and ss. 775.08401 and 775.0842.

(6) Each career criminal apprehension program, as one of its functions, shall maintain coordination with the prosecutor assigned to each case resulting from its efforts. This coordination shall

include, but is not limited to, case preparation, processing, and adjudication.

History.—s. 5, ch. 88-131; s. 3, ch. 89-280; s. 6, ch. 95-182.

775.0845 Wearing mask while committing offense; reclassification.¹

The felony or misdemeanor degree of any criminal offense, other than a violation of ss. 876.12-876.15, shall be reclassified to the next higher degree as provided in this section if, while committing the offense, the offender was wearing a hood, mask, or other device that concealed his or her identity.

(1)(a) In the case of a misdemeanor of the second degree, the offense is reclassified to a misdemeanor of the first degree.

(b) In the case of a misdemeanor of the first degree, the offense is reclassified to a felony of the third degree. For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, such offense is ranked in level 2 of the offense severity ranking chart.

(2)(a) In the case of a felony of the third degree, the offense is reclassified to a felony of the second degree.

(b) In the case of a felony of the second degree, the offense is reclassified to a felony of the first degree.

For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a felony offense that is reclassified under this subsection is ranked one level above the ranking under s. 921.0012 or s. 921.0013, or s. 921.0023 of the offense committed.

History.—s. 2, ch. 81-249; s. 21, ch. 95-184; s. 1, ch. 97-39; s. 1185, ch. 97-102; s. 13, ch. 97-194.

775.0846 Wearing bulletproof vest while committing certain offenses.

(1) For the purposes of this section, the term “bulletproof vest” means a bullet-resistant soft body armor providing, as a minimum standard, the level of protection known as “threat level I,” which

§ 6.2

DRUG OFFENSES

6–165

shall mean at least seven layers of bullet-resistant material providing protection from three shots of 158-grain lead ammunition fired from a .38 caliber handgun at a velocity of 850 feet per second.

(2) A person is guilty of the unlawful wearing of a bulletproof vest when, acting alone or with one or more other persons and while possessing a firearm, he or she commits or attempts to commit any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy and, in the course of and in furtherance of any such crime, he or she wears a bulletproof vest.

(3) Any person who is convicted of a violation of this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 1, ch. 85-29; s. 1186, ch. 97-102.

775.085 Evidencing prejudice while committing offense; enhanced penalties.

(1)(a) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age of the victim:

1. A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.
2. A misdemeanor of the first degree is reclassified to a felony of the third degree.
3. A felony of the third degree is reclassified to a felony of the second degree.
4. A felony of the second degree is reclassified to a felony of the first degree.
5. A felony of the first degree is reclassified to a life felony.

(b) As used in paragraph (a), the term:

1. “Mental or physical disability” means that the victim suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, and has one or more physical or mental limitations that restrict the victim’s ability to perform the normal activities of daily living.

2. “Advanced age” means that the victim is older than 65 years of age.

(2) A person or organization which establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section shall have a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney’s fees and costs.

(3) It is an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated in this section.

History.—s. 1, ch. 89-133; s. 1, ch. 91-83; s. 1, ch. 98-83; s. 1, ch. 99-172.

775.087 Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence.¹

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony.

(b) In the case of a felony of the second degree, to a felony of the first degree.

(c) In the case of a felony of the third degree, to a felony of the second degree.

§ 6.2

DRUG OFFENSES

6-167

For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a felony offense which is reclassified under this section is ranked one level above the ranking under s. 921.0012 or s. 921.0013 of the felony offense committed.

(2)(a)1. Any person who is convicted of a felony or an attempt to commit a felony, regardless of whether the use of a weapon is an element of the felony, and the conviction was for:

- a. Murder;
- b. Sexual battery;
- c. Robbery;
- d. Burglary;
- e. Arson;
- f. Aggravated assault;
- g. Aggravated battery;
- h. Kidnapping;
- i. Escape;
- j. Aircraft piracy;
- k. Aggravated child abuse;
- l. Aggravated abuse of an elderly person or disabled adult;
- m. Unlawful throwing, placing, or discharging of a destructive device or bomb;
- n. Carjacking;
- o. Home-invasion robbery; or
- p. Aggravated stalking
- q. Trafficking in cannabis, trafficking in cocaine, capital importation of cocaine, trafficking in illegal drugs, capital

6-168

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

importation of illegal drugs, trafficking in phencyclidine, capital importation of phencyclidine, trafficking in methaqualone, capital importation of methaqualone, trafficking in amphetamine, capital importation of amphetamine, trafficking in flunitrazepam, trafficking in gamma-hydroxybutyric acid (GHB), trafficking in 1,4-Butanediol, trafficking in Phenethylamines, or other violation of s. 893.135(1); or

r. Possession of a firearm by a felon

and during the commission of the offense, such person possessed a “firearm” or “destructive device” as those terms are defined in s. 790.001, shall be sentenced to a minimum term of imprisonment of 10 years, except that a person who is convicted for aggravated assault, possession of a firearm by a felon, or burglary of a conveyance shall be sentenced to a minimum term of imprisonment of 3 years if such person possessed a “firearm” or “destructive device” during the commission of the offense.

2. Any person who is convicted of a felony or an attempt to commit a felony listed in sub-subparagraphs (a)1.a.-q., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a “firearm” or “destructive device” as defined in s. 790.001 shall be sentenced to a minimum term of imprisonment of 20 years.

3. Any person who is convicted of a felony or an attempt to commit a felony listed in sub-subparagraphs (a)1.a.-q., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a “firearm” or “destructive device” as defined in s. 790.001 and, as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.

(b) Subparagraph (a)1., subparagraph (a)2., or subparagraph (a) 3. does not prevent a court from imposing a longer sentence of incarceration as authorized by law in addition to the minimum

§ 6.2

DRUG OFFENSES

6-169

mandatory sentence, or from imposing a sentence of death pursuant to other applicable law. Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not authorize a court to impose a lesser sentence than otherwise required by law.

Notwithstanding s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, and the defendant is not eligible for statutory gain-time under s. 944.275 or any form of discretionary early release, other than pardon or executive clemency, or conditional medical release under s. 947.149, prior to serving the minimum sentence.

(c) If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the mandatory minimum sentence must be imposed. If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the sentence imposed by the court must include the mandatory minimum term of imprisonment as required in this section.

(d) It is the intent of the Legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.

(3)(a)1. Any person who is convicted of a felony or an attempt to commit a felony and the conviction was for:

- a. Murder;
- b. Sexual battery;
- c. Robbery;
- d. Burglary;

6-170

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

- e. Arson;
- f. Aggravated assault;
- g. Aggravated battery;
- h. Kidnapping;
- i. Escape;
- j. Sale, manufacture, delivery, or intent to sell, manufacture, or deliver any controlled substance;
- k. Aircraft piracy;
- l. Aggravated child abuse;
- m. Aggravated abuse of an elderly person or disabled adult;
- n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
- o. Carjacking;
- p. Home-invasion robbery; or
- q. Aggravated stalking
- r. Trafficking in cannabis, trafficking in cocaine, capital importation of cocaine, trafficking in illegal drugs, capital importation of illegal drugs, trafficking in phencyclidine, capital importation of phencyclidine, trafficking in methaqualone, capital importation of methaqualone, trafficking in amphetamine, capital importation of amphetamine, trafficking in flunitrazepam, trafficking in gamma-hydroxybutyric acid (GHB), trafficking in 1,4-Butanediol, trafficking in Phenethylamines, or other violation of s. 893.135(1);

and during the commission of the offense, such person possessed a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun as defined in s. 790.001, shall be sentenced to a minimum term of imprisonment of 15 years.

2. Any person who is convicted of a felony or an attempt to commit a felony listed in subparagraph (a)1., regardless of

§ 6.2

DRUG OFFENSES

6-171

whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a semiautomatic firearm and its high-capacity box magazine or a “machine gun” as defined in s. 790.001 shall be sentenced to a minimum term of imprisonment of 20 years.

3. Any person who is convicted of a felony or an attempt to commit a felony listed in subparagraph (a)1., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a semiautomatic firearm and its high-capacity box magazine or a “machine gun” as defined in s. 790.001 and, as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.

(b) Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not prevent a court from imposing a longer sentence of incarceration as authorized by law in addition to the minimum mandatory sentence, or from imposing a sentence of death pursuant to other applicable law. Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not authorize a court to impose a lesser sentence than otherwise required by law.

Notwithstanding s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, and the defendant is not eligible for statutory gain-time under s. 944.275 or any form of discretionary early release, other than pardon or executive clemency, or conditional medical release under s. 947.149, prior to serving the minimum sentence.

(c) If the minimum mandatory terms of imprisonment pursuant to this section exceed the maximum sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the mandatory minimum sentence must be imposed. If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentence that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the sentence imposed by the

court must include the mandatory minimum term of imprisonment required in this section.

(d) It is the intent of the Legislature that offenders who possess, carry, display, use, threaten to use, or attempt to use a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun as defined in s. 790.001 be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.

(e) As used in this subsection, the term:

1. “High-capacity detachable box magazine” means any detachable box magazine, for use in a semiautomatic firearm, which is capable of being loaded with more than 20 centerfire cartridges.

2. “Semiautomatic firearm” means a firearm which is capable of firing a series of rounds by separate successive depressions of the trigger and which uses the energy of discharge to perform a portion of the operating cycle.

(4) For purposes of imposition of minimum mandatory sentencing provisions of this section, with respect to a firearm, the term “possession” is defined as carrying it on the person. Possession may also be proven by demonstrating that the defendant had the firearm within physical reach with ready access with the intent to use the firearm during the commission of the offense, if proven beyond a reasonable doubt.

(5) In every case in which a law enforcement agency based a criminal charge on facts demonstrating that the defendant met the criteria in subparagraph (2)(a)1., subparagraph (2)(a)2., or subparagraph (2)(a)3. or subparagraph (3)(a)1., subparagraph (3)(a)2., or subparagraph (3)(a)3. and in which the defendant did not receive the mandatory penalty, the state attorney must place in the court file a memorandum explaining why the minimum mandatory penalty was not imposed.

§ 6.2

DRUG OFFENSES

6-173

(6) This section does not apply to law enforcement officers or to United States military personnel who are performing their lawful duties or who are traveling to or from their places of employment or assignment to perform their lawful duties.

History.—s. 9, ch. 74-383; s. 1, ch. 75-7; s. 3, ch. 75-298; s. 2, ch. 76-75; s. 51, ch. 83-215; s. 3, ch. 89-306; s. 2, ch. 90-124; s. 2, ch. 90-176; s. 19, ch. 95-184; s. 9, ch. 95-195; s. 15, ch. 96-322; s. 55, ch. 96-388; s. 14, ch. 97-194; s. 1, ch. 99-12; s. 88, ch. 2000-1587; s. 5, ch. 2000-320.

¹Note.—Section 19, ch. 95-184, provides for applicability to sentencing for offenses committed on or after October 1, 1995.

775.0875 Unlawful taking, possession, or use of law enforcement officer's firearm; crime reclassification; penalties.¹

(1) A person who, without authorization, takes a firearm from a law enforcement officer lawfully engaged in law enforcement duties commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) If a person violates subsection (1) and commits any other crime involving the firearm taken from the law enforcement officer, such crime shall be reclassified as follows:

- (a)1. In the case of a felony of the first degree, to a life felony.
2. In the case of a felony of the second degree, to a felony of the first degree.
3. In the case of a felony of the third degree, to a felony of the second degree.

For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a felony offense that is reclassified under this paragraph is ranked one level above the ranking under s. 921.0012 or s. 921.0013 of the felony offense committed.

(b) In the case of a misdemeanor, to a felony of the third degree. For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, such offense is ranked in level 2 of the offense severity ranking chart.

(3) A person who possesses a firearm that he or she knows was unlawfully taken from a law enforcement officer commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

History.—s. 2, ch. 89-157; s. 17, ch. 93-406; s. 22, ch. 95-184; s. 56, ch. 96-388; s. 15, ch. 97-194.

¹**Note.**—Section 22, ch. 95-184, provides for applicability to sentencing for offenses committed on or after October 1, 1995.

775.0877 Criminal transmission of HIV; procedures; penalties.

(1) In any case in which a person has been convicted of or has pled nolo contendere or guilty to, regardless of whether adjudication is withheld, any of the following offenses, or the attempt thereof, which offense or attempted offense involves the transmission of body fluids from one person to another:

- (a) Section 794.011, relating to sexual battery,
- (b) Section 826.04, relating to incest,
- (c) Section 800.04(1), (2), and (3), relating to lewd, lascivious, or indecent assault or act upon any person less than 16 years of age,
- (d) Sections 784.011, 784.07(2)(a), and 784.08(2)(d), relating to assault,
- (e) Sections 784.021, 784.07(2)(c), and 784.08(2)(b), relating to aggravated assault,
- (f) Sections 784.03, 784.07(2)(b), and 784.08(2)(c), relating to battery,
- (g) Sections 784.045, 784.07(2)(d), and 784.08(2)(a), relating to aggravated battery,
- (h) Section 827.03(1), relating to child abuse,
- (i) Section 827.03(2), relating to aggravated child abuse,
- (j) Section 825.102(1), relating to abuse of an elderly person or disabled adult,

§ 6.2

DRUG OFFENSES

6-175

(k) Section 825.102(2), relating to aggravated abuse of an elderly person or disabled adult,

(l) Section 827.071, relating to sexual performance by person less than 18 years of age,

(m) Sections 796.03, 796.07, and 796.08, relating to prostitution, or

(n) Section 381.0041(11)(b), relating to donation of blood, plasma, organs, skin, or other human tissue,

the court shall order the offender to undergo HIV testing, to be performed under the direction of the Department of Health in accordance with s. 381.004, unless the offender has undergone HIV testing voluntarily or pursuant to procedures established in s. 381.004(3)(i)6. or s. 951.27, or any other applicable law or rule providing for HIV testing of criminal offenders or inmates, subsequent to his arrest for an offense enumerated in paragraphs (a)–(n) for which he was convicted or to which he pled nolo contendere or guilty. The results of an HIV test performed on an offender pursuant to this subsection are not admissible in any criminal proceeding arising out of the alleged offense.

(2) The results of the HIV test must be disclosed under the direction of the Department of Health to the offender who has been convicted of or pled nolo contendere or guilty to an offense specified in subsection (1), the public health agency of the county in which the conviction occurred and, if different, the county of residence of the offender, and, upon request pursuant to s. 960.003, to the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor.

(3) An offender who has undergone HIV testing pursuant to subsection (1), and to whom positive test results have been disclosed pursuant to subsection (2), who commits a second or subsequent offense enumerated in paragraphs (1)(a)–(n), commits criminal transmission of HIV, a felony of the third degree, punishable as provided in subsection (7). A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime enumerated in paragraphs (1)(a)–(n).

(4) An offender may challenge the positive results of an HIV test performed pursuant to this section and may introduce results of a backup test performed at his or her own expense.

(5) Nothing in this section requires that an HIV infection have occurred in order for an offender to have committed criminal transmission of HIV.

(6) For an alleged violation of any offense enumerated in paragraphs (1)(a)–(n) for which the consent of the victim may be raised as a defense in a criminal prosecution, it is an affirmative defense to a charge of violating this section that the person exposed knew that the offender was infected with HIV, knew that the action being taken could result in transmission of the HIV infection, and consented to the action voluntarily with that knowledge.

(7) In addition to any other penalty provided by law for an offense enumerated in paragraphs (1)(a)–(n), the court may require an offender convicted of criminal transmission of HIV to serve a term of criminal quarantine community control, as described in s. 948.001.

History.—s. 8, ch. 93-227; s. 7, ch. 96-221; s. 2, ch. 96-293; s. 16, ch. 96-322; s. 4, ch. 97-37; s. 1811, ch. 97-102; s. 95, ch. 99-3; s. 291, ch. 99-8.

¹**Note.**—Section 800.4 was substantially reworded by s. 6, ch. 99-201.

775.089 Restitution.

(1)(a) In addition to any punishment, the court shall order the defendant to make restitution to the victim for:

1. Damage or loss caused directly or indirectly by the defendant's offense; and
2. Damage or loss related to the defendant's criminal episode,

unless it finds clear and compelling reasons not to order such restitution. Restitution may be monetary or nonmonetary restitution. The court shall make the payment of restitution a condition of probation in accordance with s. 948.03. An order requiring the defendant to make restitution to a victim does not remove or diminish the requirement that the court order payment to the Crimes Compensation Trust Fund

§ 6.2

DRUG OFFENSES

6-177

pursuant to chapter 960. Payment of an award by the Crimes Compensation Trust Fund shall create an order of restitution to the Crimes Compensation Trust Fund, unless specifically waived in accordance with subparagraph (b)1.

(b)1. If the court does not order restitution, or orders restitution of only a portion of the damages, as provided in this section, it shall state on the record in detail the reasons therefor.

2. An order of restitution entered as part of a plea agreement is as definitive and binding as any other order of restitution, and a statement to such effect must be made part of the plea agreement. A plea agreement may contain provisions that order restitution relating to criminal offenses committed by the defendant to which the defendant did not specifically enter a plea.

(c) The term “victim” as used in this section and in any provision of law relating to restitution means each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant’s offense or criminal episode, and also includes the victim’s estate if the victim is deceased, and the victim’s next of kin if the victim is deceased as a result of the offense.

(2)(a) When an offense has resulted in bodily injury to a victim, a restitution order entered under subsection (1) shall require that the defendant:

1. Pay the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing.

2. Pay the cost of necessary physical and occupational therapy and rehabilitation.

3. Reimburse the victim for income lost by the victim as a result of the offense.

4. In the case of an offense which resulted in bodily injury that also resulted in the death of a victim, pay an amount equal to the cost of necessary funeral and related services.

6-178

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

(b) When an offense has not resulted in bodily injury to a victim, a restitution order entered under subsection (1) may require that the defendant reimburse the victim for income lost by the victim as a result of the offense.

(3)(a) The court may require that the defendant make restitution under this section within a specified period or in specified installments.

(b) The end of such period or the last such installment shall not be later than:

1. The end of the period of probation if probation is ordered;
2. Five years after the end of the term of imprisonment imposed if the court does not order probation; or
3. Five years after the date of sentencing in any other case.

(c) Notwithstanding this subsection, a court that has ordered restitution for a misdemeanor offense shall retain jurisdiction for the purpose of enforcing the restitution order for any period, not to exceed 5 years, that is pronounced by the court at the time restitution is ordered.

(d) If not otherwise provided by the court under this subsection, restitution must be made immediately.

If the restitution ordered by the court is not made within the time period specified, the court may continue the restitution order through the duration of the civil judgment provision set forth in subsection (5) and as provided in s. 55.10.

(4) If a defendant is placed on probation or paroled, complete satisfaction of any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation, and the Parole Commission may revoke parole, if the defendant fails to comply with such order.

(5) An order of restitution may be enforced by the state, or by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action. The outstanding unpaid amount of the order of restitution bears interest in accordance with

§ 6.2

DRUG OFFENSES

6-179

s. 55.03, and, when properly recorded, becomes a lien on real estate owned by the defendant. If civil enforcement is necessary, the defendant shall be liable for costs and attorney's fees incurred by the victim in enforcing the order.

(6)(a) The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense.

(b) The criminal court, at the time of enforcement of the restitution order, shall consider the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate.

(7) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the state attorney. The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and the financial needs of the defendant and his dependents is on the defendant. The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.

(8) The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding. An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery.

(9) When a corporation or unincorporated association is ordered to make restitution, the person authorized to make disbursements from the assets of such corporation or association shall pay restitution from such assets, and such person may be held in contempt for failure to make such restitution.

(10)(a) Any default in payment of restitution may be collected by any means authorized by law for enforcement of a judgment.

6-180

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

(b) The restitution obligation is not subject to discharge in bankruptcy, whether voluntary or involuntary, or to any other statutory or common-law proceeding for relief against creditors.

(11)(a) The court may order the clerk of the court to collect and dispense restitution payments in any case.

(b) The court may order the Department of Corrections to collect and dispense restitution and other payments from persons remanded to its custody or supervision.

(12)(a) Issuance of income deduction order with an order for restitution.—

1. Upon the entry of an order for restitution, the court shall enter a separate order for income deduction if one has not been entered.

2. The income deduction order shall direct a payor to deduct from all income due and payable to the defendant the amount required by the court to meet the defendant's obligation.

3. The income deduction order shall be effective so long as the order for restitution upon which it is based is effective or until further order of the court.

4. When the court orders the income deduction, the court shall furnish to the defendant a statement of his rights, remedies, and duties in regard to the income deduction order. The statement shall state:

- a. All fees or interest which shall be imposed.
- b. The total amount of income to be deducted for each pay period.
- c. That the income deduction order applies to current and subsequent payors and periods of employment.
- d. That a copy of the income deduction order will be served on the defendant's payor or payors.
- e. That enforcement of the income deduction order may only be contested on the ground of mistake of fact regarding the amount of restitution owed.

§ 6.2

DRUG OFFENSES

6–181

f. That the defendant is required to notify the clerk of court within 7 days after changes in the defendant's address, payors, and the addresses of his payors.

(b) Enforcement of income deduction orders.—

1. The clerk of court or probation officer shall serve an income deduction order and the notice to payor on the defendant's payor unless the defendant has applied for a hearing to contest the enforcement of the income deduction order.

2.a. Service by or upon any person who is a party to a proceeding under this subsection shall be made in the manner prescribed in the Florida Rules of Civil Procedure for service upon parties.

b. Service upon the defendant's payor or successor payor under this subsection shall be made by prepaid certified mail, return receipt requested, or in the manner prescribed in chapter 48.

3. The defendant, within 15 days after having an income deduction order entered against him, may apply for a hearing to contest the enforcement of the income deduction order on the ground of mistake of fact regarding the amount of restitution owed. The timely request for a hearing shall stay the service of an income deduction order on all payors of the defendant until a hearing is held and a determination is made as to whether the enforcement of the income deduction order is proper.

4. The notice to payor shall contain only information necessary for the payor to comply with the income deduction order. The notice shall:

a. Require the payor to deduct from the defendant's income the amount specified in the income deduction order and to pay that amount to the clerk of court.

b. Instruct the payor to implement the income deduction order no later than the first payment date which occurs more than 14 days after the date the income deduction order was served on the payor.

6-182

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

c. Instruct the payor to forward within 2 days after each payment date to the clerk of court the amount deducted from the defendant's income and a statement as to whether the amount totally or partially satisfies the periodic amount specified in the income deduction order.

d. Specify that, if a payor fails to deduct the proper amount from the defendant's income, the payor is liable for the amount the payor should have deducted plus costs, interest, and reasonable attorney's fees.

e. Provide that the payor may collect up to \$5 against the defendant's income to reimburse the payor for administrative costs for the first income deduction and up to \$2 for each deduction thereafter.

f. State that the income deduction order and the notice to payor are binding on the payor until further notice by the court or until the payor no longer provides income to the defendant.

g. Instruct the payor that, when he no longer provides income to the defendant, he shall notify the clerk of court and shall also provide the defendant's last known address and the name and address of the defendant's new payor, if known, and that, if the payor violates this provision, the payor is subject to a civil penalty not to exceed \$250 for the first violation or \$500 for any subsequent violation.

h. State that the payor shall not discharge, refuse to employ, or take disciplinary action against the defendant because of an income deduction order and shall state that a violation of this provision subjects the payor to a civil penalty not to exceed \$250 for the first violation or \$500 for any subsequent violation.

i. Inform the payor that, when he receives income deduction orders requiring that the income of two or more defendants be deducted and sent to the same clerk of court, he may combine the amounts that are to be paid to the depository in a single payment as long as he identifies that portion of the payment attributable to each defendant.

§ 6.2

DRUG OFFENSES

6-183

j. Inform the payor that if the payor receives more than one income deduction order against the same defendant, he shall contact the court for further instructions.

5. The clerk of court shall enforce income deduction orders against the defendant's successor payor who is located in this state in the same manner prescribed in this subsection for the enforcement of an income deduction order against an original payor.

6. A person may not discharge, refuse to employ, or take disciplinary action against an employee because of the enforcement of an income deduction order. An employer who violates this provision is subject to a civil penalty not to exceed \$250 for the first violation or \$500 for any subsequent violation.

7. When a payor no longer provides income to a defendant, he shall notify the clerk of court and shall provide the defendant's last known address and the name and address of the defendant's new payor, if known. A payor who violates this provision is subject to a civil penalty not to exceed \$250 for the first violation or \$500 for a subsequent violation.

History.—s. 1, ch. 77-150; s. 288, ch. 79-400; s. 5, ch. 84-363; s. 2, ch. 88-96; s. 38, ch. 88-122; s. 10, ch. 89-526; s. 2, ch. 92-107; s. 1, ch. 93-37; s. 3, ch. 93-69; s. 19, ch. 94-342; s. 1, ch. 95-160; s. 1187, ch. 97-102; s. 1, ch. 99-358.

775.13 Registration of convicted felons, exemptions; penalties.

(1) As used in this section, the term “convicted” means, with respect to a person's felony offense, a determination of guilt which is the result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld.

(2) Any person who has been convicted of a felony in any court of this state shall, within 48 hours after entering any county in this state, register with the sheriff of said county, be fingerprinted and photographed, and list the crime for which convicted, place of conviction, sentence imposed, if any, name, aliases, if any, address, and occupation.

(3) Any person who has been convicted of a crime in any federal court or in any court of a state other than Florida, or of any foreign

state or country, which crime if committed in Florida would be a felony, shall forthwith within 48 hours after entering any county in this state register with the sheriff of said county in the same manner as provided for in subsection (2).

(4) In lieu of registering with the sheriff as required by this section, such registration may be made with the Department of Law Enforcement, and is subject to the same terms and conditions as required for registration with the sheriff.

(5) This section does not apply to an offender:

(a) Who has had his or her civil rights restored;

(b) Who has received a full pardon for the offense for which convicted;

(c) Who has been lawfully released from incarceration or other sentence or supervision for a felony conviction for more than 5 years prior to such time for registration, unless the offender is a fugitive from justice on a felony charge or has been convicted of any offense since release from such incarceration or other sentence or supervision;

(d) Who is a parolee or probationer under the supervision of the United States Parole Commission if the commission knows of and consents to the presence of the offender in Florida or is a probationer under the supervision of any federal probation officer in the state or who has been lawfully discharged from such parole or probation;

(e) Who is a sexual predator and has registered as required under s. 775.21.

(f) Who is a sexual offender and has registered as required in s. 943.0435 or s. 944.607.

(6) Failure of any such convicted felon to comply with this section constitutes a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(7) All laws and parts of laws in conflict herewith are hereby repealed, provided that nothing in this section shall be construed

§ 6.2

DRUG OFFENSES

6–185

to affect any law of this state relating to registration of criminals where the penalties are in excess of those imposed by this section.

History.—ss. 1, 2, 3, 4, 5, 6, 7, ch. 57-19; s. 1, ch. 57-371; s. 1, ch. 63-191; s. 1, ch. 65-453; s. 3, ch. 67-2207; ss. 20, 33, 35, ch. 69-106; s. 699, ch. 71-136; s. 11, ch. 77-120; s. 1, ch. 77-174; s. 18, ch. 79-3; s. 21, ch. 79-8; s. 161, ch. 83-216; s. 63, ch. 96-388; s. 4, ch. 97-299; s. 2, ch. 98-81; s. 1, ch. 2000-328.

775.15 Time limitations.

(1)(a) A prosecution for a capital felony, a life felony, or a felony that resulted in a death may be commenced at any time. A prosecution for a felony that resulted in injury to any person, when such felony arises from the use of a “destructive device,” as defined in s. 790.001, may be commenced within 10 years. If the death penalty is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, all crimes designated as capital felonies shall be considered life felonies for the purposes of this section, and prosecution for such crimes may be commenced at any time.

(b) Except as otherwise provided in this subsection (7), a prosecution for a first or second degree felony violation of s. 794.011, if such crime is reported to a law enforcement agency within 72 hours after commission of the crime, may be commenced at any time. If such crime is not reported within 72 hours after the commission of the crime, the prosecution must be commenced within the time periods prescribed in subsection (2).

(c) A prosecution for perjury in an official proceeding that relates to the prosecution of a capital felony may be commenced at any time.

(2) Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:

(a) A prosecution for a felony of the first degree must be commenced within 4 years after it is committed.

(b) A prosecution for any other felony must be commenced within 3 years after it is committed.

(c) A prosecution for a misdemeanor of the first degree must be commenced within 2 years after it is committed.

6-186

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.2

- (d) A prosecution for a misdemeanor of the second degree or a noncriminal violation must be commenced within 1 year after it is committed.
- (e) A prosecution for a felony violation of chapter 517 or s. 409.920 must be commenced within 5 years after the violation is committed.
- (f) A prosecution for a felony violation of chapter 403 must be commenced within 5 years after the date of discovery of the violation.
- (g) A prosecution for a felony violation of s. 825.102 must be commenced within 4 years after it is committed.
- (h) A prosecution for a felony violation of ss. 440.105 and 817.234 must be commenced within 5 years after the violation is committed.
- (3) If the period prescribed in subsection (2) has expired, a prosecution may nevertheless be commenced for:
- (a) Any offense, a material element of which is either fraud or a breach of fiduciary obligation, within 1 year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than 3 years.
- (b) Any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment, within 2 years from the time he leaves public office or employment, or during any time permitted by any other part of this section, whichever time is greater.
- (4) An offense is committed either when every element has occurred or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.
- (5)(a) Prosecution on a charge on which the defendant has previously been arrested or served with a summons is commenced

§ 6.2

DRUG OFFENSES

6-187

by the filing of an indictment, information, or other charging document.

(b) A prosecution on a charge on which the defendant has not previously been arrested or served with a summons, is commenced when either an indictment or information is filed, provided the *capias*, summons or other process issued on such indictment or information is executed without unreasonable delay. In determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered. The failure to execute process on or extradite a defendant in another state who has been charged by information or indictment with a crime in this state shall not constitute an unreasonable delay.

(c) If, however, an indictment or information has been filed within the time period prescribed in this section and the indictment or information is dismissed or set aside because of a defect in its content or form after the time period has elapsed, the period for commencing prosecution shall be extended 3 months from the time the indictment or information is dismissed or set aside.

(6) The period of limitation does not run during any time when the defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state. This provision shall not extend the period of limitation otherwise applicable by more than 3 years, but shall not be construed to limit the prosecution of a defendant who has been timely charged by indictment or information or other charging document and who has not been arrested due to his or her absence from this state or has been extradited for prosecution from another state.

(7) If the victim of a violation of s. 794.011, former s. 794.05, Florida Statutes 1995, s. 800.04, or s. 826.04 is under the age of 16, the applicable period of limitation, if any, does not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the state attorney for the judicial circuit in which the alleged violation occurred. If the offense is a first or second degree felony violation

of s. 794.011, and the crime is reported within 72 hours after its commission, paragraph (1)(b) applies. This subsection applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before December 31, 1984.

History.—Feb. 10, 1832; s. 1, ch. 4915, 1901; RS 2357; GS 3181, 3182; RGS 5011, 5012; CGL 7113, 7114; s. 1, ch. 16962, 1935; s. 10, ch. 26484, 1951; s. 109, ch. 70-339; s. 10, ch. 74-383; s. 1, ch. 76-275; s. 1, ch. 77-174; s. 12, ch. 78-435; s. 6, ch. 84-86; s. 1, ch. 84-550; s. 10, ch. 85-63; s. 4, ch. 89-143; s. 2, ch. 90-120; s. 2, ch. 91-258; s. 16, ch. 93-156; s. 17, ch. 95-158; s. 139, ch. 95-418; s. 1, ch. 96-145; s. 3, ch. 96-280; s. 3, ch. 96-322; s. 4, ch. 96-409; s. 1, ch. 97-36; s. 1, ch. 97-90; s. 1812, ch. 97-102; s. 1, ch. 97-104; s. 17, ch. 98-174; s. 7, ch. 99-201; s. 5, ch. 99-204; s. 3, ch. 2000-246.

Note.—See former ss. 932.05, 932.06, 915.03, 932.465.

775.16 Drug offenses; additional penalties.

In addition to any other penalty provided by law, a person who has been convicted of sale of or trafficking in, or conspiracy to sell or traffic in, a controlled substance under chapter 893, if such offense is a felony, or who has been convicted of an offense under the laws of any state or country which, if committed in this state, would constitute the felony of selling or trafficking in, or conspiracy to sell or traffic in, a controlled substance under chapter 893, is:

(1) Disqualified from applying for employment by any agency of the state, unless:

(a) The person has completed all sentences of imprisonment or supervisory sanctions imposed by the court, by the Parole Commission, or by law; or

(b) The person has complied with the conditions of subparagraphs 1. and 2. which shall be monitored by the Department of Corrections while the person is under any supervisory sanctions. The person under supervision may:

1. Seek evaluation and enrollment in, and once enrolled maintain enrollment in until completion, a drug treatment and rehabilitation program which is approved by the Department of Children and Family Services, unless it is deemed by the program that the person does not have a substance abuse problem. The treatment and rehabilitation program may be specified by:

§ 6.2

DRUG OFFENSES

6-189

- a. The court, in the case of court-ordered supervisory sanctions;
- b. The Parole Commission, in the case of parole, control release, or conditional release; or
- c. The Department of Corrections, in the case of imprisonment or any other supervision required by law.

2. Submit to periodic urine drug testing pursuant to procedures prescribed by the Department of Corrections. If the person is indigent, the costs shall be paid by the Department of Corrections.

(2) Disqualified from applying for a license, permit, or certificate required by any agency of the state to practice, pursue, or engage in any occupation, trade, vocation, profession, or business, unless:

(a) The person has completed all sentences of imprisonment or supervisory sanctions imposed by the court, by the Parole Commission, or by law;

(b) The person has complied with the conditions of subparagraphs 1. and 2. which shall be monitored by the Department of Corrections while the person is under any supervisory sanction. If the person fails to comply with provisions of these subparagraphs by either failing to maintain treatment or by testing positive for drug use, the department shall notify the licensing, permitting, or certifying agency, which may refuse to reissue or reinstate such license, permit, or certification. The licensee, permittee, or certificateholder under supervision may:

1. Seek evaluation and enrollment in, and once enrolled maintain enrollment in until completion, a drug treatment and rehabilitation program which is approved or regulated by the Department of Children and Family Services, unless it is deemed by the program that the person does not have a substance abuse problem. The treatment and rehabilitation program may be specified by:

- a. The court, in the case of court-ordered supervisory sanctions;

6-190 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.2

b. The Parole Commission, in the case of parole, control release, or conditional release; or

c. The Department of Corrections, in the case of imprisonment or any other supervision required by law.

2. Submit to periodic urine drug testing pursuant to procedures prescribed by the Department of Corrections. If the person is indigent, the costs shall be paid by the Department of Corrections; or

(c) The person has successfully completed an appropriate program under the Correctional Education Program.

The provisions of this section do not apply to any of the taxes, fees, or permits regulated, controlled, or administered by the Department of Revenue in accordance with the provisions of s. 213.05.

History.—s. 2, ch. 90-266; s. 21, ch. 92-310; s. 13, ch. 95-325; s. 292, ch. 99-8.

790.145 Crimes in pharmacies; possession of weapons; penalties.

(1) Unless otherwise provided by law, any person who is in possession of a concealed “firearm,” as defined in s. 790.001(6), or a “destructive device,” as defined in s. 790.001(4), within the premises of a “pharmacy,” as defined in chapter 465, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) The provisions of this section do not apply:

(a) To any law enforcement officer;

(b) To any person employed and authorized by the owner, operator, or manager of a pharmacy to carry a firearm or destructive device on such premises; or

(c) To any person licensed to carry a concealed weapon.

History.—s. 1, ch. 81-278; s. 2, ch. 90-124; s. 2, ch. 90-176.

§ 6.3[A][1.]

DRUG OFFENSES

6–191

§ 6.3. POSSESSION**A. Elements — General****[1.]—Statutory References**

There are several places in the statute where the fact of “possession” is important. They are as follows:

- § 893.06(2) Concerning lawful possession of controlled substances under Schedule I and II by a person authorized in a business or occupation.
- § 893.12(1) Unlawful possession of all controlled substances within the statute as “contraband” and subject to confiscation.
- § 893.13(1)(a) Making it unlawful to possess with intent to sell a controlled substance.
- § 893.13(2)(b) Unlawful possession of controlled substance listed in Schedule I (a) and (b) in excess of 10 grams.
- § 893.13(5) Unlawfully bringing into the state a controlled substance under this statute.
- § 893.13(6)(a) The main possession violation which includes actual or constructive possession of a controlled substance in a manner other than authorized by the statute.
- § 893.13(6)(b) Misdemeanor provision for possession or delivery without consideration of not more than 20 grams of cannabis.
- § 893.13(7)(a)(9) Acquiring possession by misrepresentation or fraud, forgery, deception or subterfuge.
- § 893.13(8) Actual or constructive possession of pharmacist, etc. as exemptions.
- § 893.149 Possess a listed chemical with the intent to unlawfully manufacture a controlled substance.
- § 893.15 Requirement of participation in Drug Rehabilitation Program for possession violation of 893.13 (6)(a) or (b).

There seems to be no reason to suppose that the definition of “Possession” as the term is carried in the new statute is any different from that used under previous statutes and, therefore, the judicial renditions of the term and its

6–192 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[A][1.]

content should be accepted until the contrary is shown.¹ A typical statement is as follows: “Possession or control for purposes of these statutes means either actual physical possession with knowledge of the same or constructive possession which is the situation where a person knows of the presence of the item on or about his premises and has the ability to maintain control of the same.”^{1A} It has also been held that to “procure” means to possess.²

However, in *Kickasola v. State*,^{2a} the court held that one is not guilty of possession merely by aiding and abetting a sale. Likewise, in *Garces v. State*,^{2b} the court held that the temporary control of contraband in the presence of the actual owner for the purpose of verifying its identity does not constitute possession.

In discussing possession, it is also important to note that Florida’s legislative proscription on the private possession of cannabis is not violative of Article I, Section 23 of the Florida Constitution dealing with the right of privacy.^{2c}

In proving possession, it is important to realize that the actual drugs in question need not necessarily be produced at trial. Where the state can prove

¹ *But see* “Comprehensive Drug Abuse Prevention and Control Act of 1970,” at 21 U.S.C.A. § 801 et seq. Federal cases may be persuasive as to the Florida version.

^{1A} *Griffin v. State*, 276 So. 2d 191 (Fla. 4th DCA 1973), *cited* as recently as 1998 in *Stephens v. State*, 712 So.2d 447 (1st DCA 1998); *See also* *Gartrell v. State*, 626 So. 2d 1364, 1366 (Fla. 1993); *Reynolds v. State*, 92 Fla. 1038, 111 So. 285 (1927); *Norman v. State*, 362 So. 2d 444 (Fla. 1st DCA 1978); *Molinaro v. State*, 360 So. 2d 119 (Fla. 3d DCA 1978); *Clark v. State*, 359 So. 2d 458 (Fla. 3d DCA 1978); *Ellis v. State*, 346 So. 2d 1044 (Fla. 1st DCA 1977); *Jordan v. State*, 344 So. 2d 1294 (Fla. 3d DCA 1977); *Dixon v. State*, 343 So. 2d 1345 (Fla. 2d DCA 1977); *Britton v. State*, 336 So. 2d 663 (Fla. 1st DCA 1976); *Sindrich v. State*, 322 So. 2d 589 (Fla. 1st DCA 1975); *Willis v. State*, 320 So. 2d 823 (Fla. 4th DCA 1975); *Taylor v. State*, 319 So. 2d 114 (Fla. 2d DCA 1975); *Camp v. State*, 293 So. 2d 114 (Fla. 4th DCA 1974); *Hilding v. State*, 291 So. 2d 111 (Fla. 4th DCA 1974); *Frank v. State*, 199 So. 2d 117 (Fla. 1st DCA 1967); *Spataro v. State*, 179 So. 2d 873 (Fla. 2d DCA 1965).

² *In re Sturup*, 456 So. 2d 927 (Fla. 4th DCA 1984).

^{2a} *Kickasola v. State*, 405 So. 2d 200 (Fla. 3d DCA 1981), *cited* for same by the Third District Court of Appeals in *D.M. v. State*, 714 So.2d 1117 (3rd DCA, 1998).

^{2b} *Garces v. State*, 485 So. 2d 847 (Fla. 3d DCA 1986), *cited* and discussed in *Campbell v. State*, 577 So.2d 932 (Fla. 1991); *See also* *Roberts v. State*, 505 So. 2d 547 (Fla. 3d DCA 1987) (touching drugs to weigh them for a purchase by a third party does not constitute possession). Also, the fact that money changes hands does not prove that possession has.

^{2c} *Maisler v. State*, 425 So. 2d 107 (Fla. 1st DCA 1982), *review denied*, 434 So.2d 888 (Fla. 1983).

its existence by expert testimony, this should suffice, although the issue arises as to whether a defendant should be allowed to have the substance tested by his or her own expert.^{2d}

[2.]—Control

While it is true that the terms “possession” and “control” as used in the above definition are in the conjunctive, there is probably no legal significance to this. It appears to result from language limitation rather than an intentional concept. In any event, the factor of “control” is an element of both actual and constructive possession and should therefore be included within the term. It is essentially the element of control, either of the contraband itself or of the premises on which it is found, that makes mere presence on such premises, without such control, a non-criminal act. As one court indicated, “more is needed to show possession of narcotics paraphernalia than merely being in a room or place where the same is located. Particularly is this true when the person charged has no control of the premises.”³ Of course this is not to imply that control plus presence would be sufficient for a possession charge, since the *mens rea* factor of scienter would also have to be demonstrated. The juxtaposition of these factors is expressed well in *Briggs v. State*,⁴ where the court said,

evidence in a criminal prosecution for possession of marijuana must show that defendant had knowledge that the contraband was in his possession and control. . . . In the instant case the evidence was sufficient to warrant a conclusion by the trier of fact that defendant knew of the presence of the narcotics and was able to exercise personal dominion over the contraband. This was sufficient to constitute unlawful possession.

In *Angel v. State*,^{4a} the court held that the suspect had possession where he was purchasing the marijuana from police officers notwithstanding the

^{2d} *Brooks v. State*, 762 So.2d 879 (Fla. 2000) citing *Madruga v. State*, 434 So. 2d 331 (Fla. 3d DCA 1983), dealing with trafficking.

³ *D.M.M. v. State*, 274 So. 2d 308 (Fla. 2d DCA 1973). See also *Britton v. State*, 336 So. 2d 663 (Fla. 1st DCA 1976); *Brown v. State*, 240 So. 2d 507 (Fla. 2d DCA 1970) (where the court held that knowledge and control are burdens carried by the state); *Frank v. State*, 199 So. 2d 117 (Fla. 1st DCA 1967).

⁴ *Briggs v. State*, 262 So. 2d 451 (Fla. 3d DCA 1972).

^{4a} *Angel v. State*, 450 So. 2d 292 (Fla. 4th DCA 1984). See also *Jean v. State*, 638 So. 2d 995 (Fla. 4th DCA 1994) (the defendant was found to be in control of cocaine rocks located on the floor of an apartment).

6–194 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[A][2.]

fact that the officers had no intention of allowing him to leave the scene with it. On the other hand, however, where it appeared that none of the defendants in another case^{4b} was a passenger in the vehicle where the drugs were found, or that none had touched or unloaded the drugs, no possession was found.

In *Thomas v. State*, the Fourth District Court of Appeals found that the state failed to prove the defendant had constructive possession of marijuana, even though the defendant owned and was driving the car in which the marijuana was found, and thus the trial court should have granted the defendant a judgment of acquittal in possession of cannabis charge; there was no evidence that the defendant knew of the illicit nature of a marijuana cigarette or that she knew it was in her presence, the officer testified that he did not know if the cigarette had been smoked, and the evidence failed to exclude the possibility that the marijuana belonged to the defendant's passenger.^{4B1}

Where an individual merely sampled a small quantity of cocaine, this was held^{4c} insufficient to constitute possession of the entire bag of the drug, notwithstanding the fact that he held the bag of it while he sampled. But, in another case,^{4d} where a defendant examined the drugs in question was sufficient to constitute possession where he had already made an advance payment of \$3,000.00, and had the balance of the money with him. It was not necessary that he pay the full price first.

Where these factors cannot be adequately demonstrated by the state they sometimes resort to unique theories to support their charge. For example, in *Spiegel v. State*,⁵ the defendant driver was charged with possession of marijuana based on marijuana which was taken from the purse of a female passenger in the back seat of an automobile which was also occupied by two additional passengers. After the discovery of the marijuana the defendant stated to the officer, "Listen, I don't know anything about

^{4b} *State v. Oswald*, 442 So. 2d 360 (Fla. 1st DCA 1983).

^{4B1} *Thomas v. State*, 743 So.2d 1190 (4th DCA 1999).

^{4c} *Jefferson v. State*, 549 So. 2d 222 (Fla. 1st DCA 1989). *See also* *Campbell v. State*, 577 So. 2d 932 (Fla. 1991); *Smith v. State*, 578 So. 2d 366, 367 (Fla. 3d DCA 1991) (temporary, preliminary inspection of drugs does not constitute possession of any of the drugs). *Compare* FLA. STAT. § 893.02(16) (temporary possession for the purpose of verification is now sufficient to constitute criminal possession).

^{4d} *Campbell v. State*, 558 So. 2d 34 (Fla. 1st DCA 1989).

⁵ *Spiegel v. State*, 260 So. 2d 694 (Fla. 4th DCA 1972).

§ 6.3[A][2.]

DRUG OFFENSES

6–195

anything else except we just went to get a little grass or a little marijuana.” There was no evidence that defendant was present when the marijuana was obtained nor that he had anything to do with the purchase or that he had any knowledge or control. Under these facts the state urged that the girl was the “alter ego” of the defendant or at least his agent and therefore, presumably, her knowledge and control became his. The Fourth District Court of Appeals did not fall into the trap, however.

The Third District Court has been more ready to find control and knowledge under such equivocal circumstances. In one instance two officers observed two persons through an open door of a public restroom. The subjects were seen only to be “kneeling on the restroom floor.” They then got up and left the restroom. After this (it was not shown how long) the officers entered and found a syringe on the floor. Where the two subjects had been kneeling were found matches and a spoon. There were no other people in the restroom, according to the testimony and no one within about 30 or 40 feet of the building. It was not stated as to whether the officers had inspected the restroom floor prior to the presence of the defendants; this the court held to be sufficient to demonstrate knowledge and control for the possession charge.⁶ For a more thorough discussion of constructive possession, *see below* section B.

The voluntary ingestion of a hallucinogenic drug which was admitted by the defendant has been held to constitute sufficient knowledge and control for the felony of possession, and properly so, since it would be difficult to theoretically differentiate the compound manually controlled outside the body from that which is confined inside following its ingestion.⁷ Whether that same rationale is also valid as to the inhalation of marijuana smoke may be questionable, however. The use of this rationale may be unnecessary, though, since the Supreme Court of Florida has held that briefly puffing on a marijuana cigarette is sufficient to support a conviction for possession of less than five grams.⁸ It would seem, then, that the brief period of possession before and during ingestion is sufficient for a conviction under the drug control statutes.

Again, as a general proposition, it may be stated that the state must show beyond a reasonable doubt that the defendant had physical or constructive

⁶ Skold v. State, 263 So. 2d 627 (Fla. 3d DCA 1972).

⁷ Clayton v. State, 272 So. 2d 860 (Fla. 3d DCA 1973); *compare* Fiske v. State, 366 So. 2d 423 (Fla. 1978).

⁸ State v. Thornton, 327 So. 2d 227 (Fla. 1976), *and see* Jones v. State, 589 So.2d 1001 (3rd DCA 1991).

6-196 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[A][2.]

possession of the object or thing said to be possessed, coupled with this knowledge of its presence.⁹ Under this state of the law, in 1969, the Second District Court of Appeals rendered an interesting opinion holding that the act of the defendant in taking a “drag” from another pipe which was filled with illegal marijuana, together with passing the pipe on around a circle of persons in which he was sitting, was not such possession or control as to support a conviction for the unlawful possession of marijuana.¹⁰ In this case it was not shown that the defendant owned the home in which this activity occurred not that he even resided therein. Additionally, it was not shown that he owned the pipe or the marijuana which was contained in the pipe. On this basis, the court concluded that such “passing control, fleeting and shadowy in its nature” was not sufficient for a finding of possession under the Statute (FLA. STAT. § 398.03).

However, the Florida Supreme Court, not willing to be upstaged by the Appellate Court, reversed this holding by applying what is now referred to as the “Reynolds Test.”¹¹ The Reynolds case defined possession as “having personal charge of or exercising the right of ownership, management, or control . . .” And again,

to constitute possession, there need not necessarily be an actual manucaption of the liquor, nor is it necessary that it be otherwise actually upon the person of the accused . . . There must, however, be a conscious and substantial possession by the accused, as distinguished from a mere involuntary or superficial possession.¹²

According to the Supreme Court, in the later *Eckroth* case, the possession and control does not have to be of great duration nor does the quantity possessed make a material difference.¹³ As the dissent indicates, the

⁹ See Footnote 2; See also *Stephenson v. State*, 371 So. 2d 554 (Fla. 2d DCA 1979).

¹⁰ *Eckroth v. State*, 227 So. 2d 313 (Fla. 2d DCA 1969).

¹¹ *State v. Eckroth*, 238 So. 2d 75 (Fla. 1970); citing *Reynolds v. State*, 92 Fla. 1038, 111 So. 285 (1927); see also *State v. Thornton*, 327 So. 2d 227 (Fla. 1976).

¹² See *State v. Eckroth*, 238 So. 2d 75 (Fla. 1970). See also *Dean v. State*, 406 So. 2d 1162 (Fla. 2d DCA 1981) (possession of less than 20 grams of cannabis upheld for sharing a joint; but evidence insufficient to show possession of cannabis in paper bag inside trunk of car).

¹³ For an example of the unfortunate extent to which zealous prosecutions in this area have gone, see *Rowe v. State*, 250 So. 2d 920 (Fla. 2d DCA 1971) where the quantity possessed was so minute it apparently could not be seen with the naked eye and the trial judge, with unabashed candor, refused to permit the jury to open the packet in which the miniscule amounts were alleged to be present.

§ 6.3[A][2.]

DRUG OFFENSES

6–197

majority opinion and the cases cited therein, demonstrate the lack of possession and, therefore, the fallibility of the opinion.

For an interesting insight into the thoughts of a law student concerning this particular problem, see Vol. 11 Stetson Intramural Law Review 85 (1971) “Eckroth Rehashed.” Because of the general unavailability of this publication, the following excerpt is offered for your consideration

It is my opinion that the Supreme Court wanted to have a say on the subject matter involved in the case, and would have accepted the case on the flimsiest of arguments. The reason for the court’s interest in this particular case is probably based upon policy considerations from both the enforcement standpoint and the standpoint of changing societal attitudes toward marijuana.

Before getting into the policy aspects of the problem, I would first like to draw attention to the Supreme Court’s definitional arguments in *Eckroth*. The court went to great lengths to apply the dictionary meanings of the terms ‘possession’ and ‘smoke,’ and then endeavored to combine these definitions to reach the conclusion which, for policy reasons, it thought most desirable.

Quoting from the Supreme Court’s decision: Webster’s Third New International Dictionary defines ‘possession’ as ‘the act or condition of having in or taking into one’s control or holding at one’s disposal’ and ‘smoke’ as to inhale and exhale the fumes of tobacco from a pipe, cigar, or cigarette.

These definitions are fine, and so far, the Supreme Court appears to be leading up to a logical conclusion. But, in its very next sentence, the Supreme Court seems to destroy its efforts when it says that ‘inhaling and exhaling requires both possession and control of the substance smoked. . . .’ I will concede that there was testimony indicating that Eckroth had smoked marijuana, but the charge against him was possession or control of marijuana. He was not charged with having smoked marijuana. The last quotation indicates that possession can be accomplished merely by inhaling and exhaling the fumes from burning marijuana. The merging of the definitions of ‘possession’ and ‘smoke’ could lead to very undesirable consequences. It seems to be an incredible proposition that in order to inhale or exhale fumes of tobacco, marijuana or even air, a person must possess and control the substance inhaled! Does this mean that a person who merely walks

6-198 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[A][2.]

into air filled with marijuana fumes is criminally liable for possession? Surely this cannot be what the court had in mind! Yet a literal interpretation of the court's definitional phraseology would hold such a person guilty of possession, and since the court has endeavored to apply strict dictionary meanings, shouldn't we in turn construe the interpretation of the court just as strictly? Several earlier cases decided during the Prohibition era demonstrated a tendency by the courts to apply a more subjective control test, as did the Second District Court of Appeal in the *Eckroth* case. Why the sudden change by the Supreme Court to very strict and objective control test? Is society's attitude toward marijuana use really that much different from its attitude toward the use of alcoholic beverages during Prohibition days? It seems as though the Supreme Court really stretched the definition of possession in order to reach its decision in the *Eckroth* case. The fact that the definition was stretched is now moot and therefore, unimportant. What is important is that the reasons for the court's action in *Eckroth* are understood so that such understanding may aid an attorney confronted with a similar situation. I believe the Supreme Court had reasons for arriving at the final *Eckroth* decision which it failed to set forth in its opinion. Perhaps the Supreme Court felt that the lower court's decision would place an insurmountable burden upon law enforcement agencies. In light of the lower court's decision, these agencies might have encountered difficulty in successfully pressing charges in many instances similar to the facts in the *Eckroth* case. If enforcement problems underlay the Supreme Court's decision, it is indeed unfortunate that the court should have been placed in such a situation. The courts really should not have to consider general enforcement problems when determining the future of an individual. When the courts are compelled to resolve such dilemmas it suggests to me a possible weakness in the appropriateness of the present marijuana laws.

One case¹⁴ constitutes an excellent example of possession. Here, defendant's abandonment of suitcases over which he had complete control, together with his flight upon seeing the police was held as sufficient evidence that he had control over and knowledge of the presence of drugs contained in the suitcases.

It must also be realized that possession may also be joint.¹⁵ That is, when

¹⁴ Lawson v. State, 319 So. 2d 613 (Fla. 1st DCA 1975). See also Ramirez v. State, 371 So. 2d 1063 (Fla. 3d DCA 1979).

¹⁵ Smith v. State, 363 So. 2d 21 (Fla. 3d DCA 1978).

§ 6.3[A][3.]

DRUG OFFENSES

6–199

it is demonstrated that several persons each have the requisite knowledge of the presence of drugs, together with the ability to maintain control over them, they may all be deemed to possess them. This is discussed in Section B *below* .

[3.]—Mens Rea-Scienter

Perhaps the best way to begin with this element is to examine a case of the Supreme Court of Florida involving the question of knowledge and its proof. In *State v. Medlin*¹⁶ the defendant had been convicted of unlawful delivery under old FLA. STAT. § 404.02. Defendant gave a 16-year-old girl a capsule telling her that it would make her “go up.” He also gave her a pill to be taken when she came down. There was no prescription for the drug. When the defendant was arrested he had a bottle in his possession which contained two capsules of the same type he had given to the girl. This conviction was reversed by the First District Court of Appeal for lack of evidence as to the knowledge of the defendant that the capsule contained a barbiturate or barbiturate derivative. (See 265 So. 2d 515.) The opinion of the District Court of Appeal was based on *Frank v. State*,¹⁷ and *Rutskin v. State*,¹⁸ which involved constructive possession problems. In both of these cases the primary question was whether the defendant had knowledge of the presence of the contraband. They did not reach the question of whether the defendant had knowledge of the *nature* of the article seized. According to the court:

Neither the *Frank* nor the *Rutskin* decisions are applicable to the factual situation presented in the instant case. Defendant admittedly had actual possession of the drug and obviously was aware that he had the drug in his possession. He admittedly delivered the capsule to the Driggers girl which contained the prescribed (SIC) drug. Proof of these facts established defendant’s guilt of the crime charged. The state was not required to prove intent to violate the statute or defendant’s specific knowledge of the contents of the capsule.

¹⁶ *State v. Medlin*, 273 So. 2d 394 (Fla. 1973). *Compare*, *Johnson v. State*, 343 So. 2d 110 (Fla. 2d DCA 1977) where the court held that failure to prove knowledge of the “nature” of the drug was not indispensable to the state’s case (emphasis added). *Cf.*, *Hassoun v. State*, 599 So. 2d 215 (Fla. 4th DCA 1992) (where a suspect purchased cocaine believing it was marijuana, the mens rea element was satisfied).

¹⁷ *Frank v. State*, 199 So. 2d 117 (Fla. 1st DCA 1967).

¹⁸ *Rutskin v. State*, 260 So. 2d 525 (Fla. 1st DCA 1972).

6–200 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[A][3.]

Without taking space here to question the court’s reasoning concerning the requirement of a criminal intent when the statute is silent concerning the matter, it would be appropriate to catalogue at least some of the *mens rea* factors that could be said to be implicit within the statute in spite of its silence.

a. Even though a possession statute is silent as to the *mens rea*, it must at a minimum, be construed to mean a “conscious and willing possession” in order to avoid a due process impediment.¹⁹ This, of course, is the rudimentary requirement of scienter.

b. It is also basic criminal law that any offense which is not intended by the legislature to be *malum prohibitum* must carry at the very least the *mens rea* requirement of a general criminal intent, which admittedly may be derived from the doing of the act itself on the presumption that persons are taken to have intended the natural and probable consequence of their action.

c. There could be a requirement of a special state of mind such as malice or particular knowledge as to certain facts.

d. There could be a requirement of a specific criminal intent such as the intent to cause a miscarriage or the intent to render one inebriated.

e. There could be a criminal negligence factor such as is present in some forms of manslaughter.

Part of the confusion in the *Medlin* opinion arises from a failure to properly delineate which of these *mens rea* problems it was treating. For example, in the quoted portion above, the statement of the court is to the effect that intent to violate the statute and knowledge of the contents are not elements. Yet a subsequent statement at page 397 says: “Proof that defendant committed the prohibited act raised the presumption that the action was knowingly and intentionally done.”

If the court means by these statements that intent to violate the statute and knowledge of the contents really *are* elements, and the state was not required to do more than produce evidence that raised an inference that the defendant did not in fact have the requisite *mens rea*, then the result would seem to be correct. If the defendant introduces conflicting evidence on the matter, it would then be a question of fact for the jury to resolve.

¹⁹ See *Baender v. Barnett*, 255 U.S. 224, 41 S. Ct. 271, 65 L. Ed. 597 involving possession of counterfeit money dies. Compare *Fink v. Holt*, 609 So.2d 1336 (Fla. 4th DCA 1992) (When the possessor of Schedule II drugs is a physician, a presumption arises that they are possessed in the course of a professional practice).

§ 6.3[A][3.]

DRUG OFFENSES

6–201

If the language of the court is taken to mean that a conscious, willing or knowing possession is not required to be demonstrated, then it is clearly contrary to numerous prior Florida cases, the Federal rule and the majority of sister state opinions.²⁰

If the language of the court is taken to mean that knowledge of the *presence* of the questioned article is required together with the general intent to possess it, but that knowledge of the *nature* of the article is not required, then a more difficult question is raised. Since the court did not specify which of these states of knowledge it was referring to, its conclusion that the knowledge and intent could be raised by presumption from the “act” further confuses.

In the first place it is manifestly incorrect to state that the element of knowledge can be raised presumptively from the very act prohibited. If this were true it would be tantamount to the effectual elimination of the requirement altogether since all the state would have to do would be to prove the fact of contraband and the knowledge would be automatically demonstrated, then placing the initial burden of disproof on the defendant, contrary to established constitutional procedures. What the court must have meant in *Medlin* was that when the *facts* of the states evidence are such as to indicate sufficiently that the defendant not only *factually* had manual possession but also was conscious of that fact, it became the burden of the defendant to rebut this inference on pain of having the jury believe the state’s evidence beyond a reasonable doubt.

It is even more ludicrous to presume that the defendant knew the *nature* of the article which he factually possessed. This does not reasonably follow from the fact of manual possession nor from the knowledge of its *presence*. In other words, it would be entirely possible and reasonable and perhaps even probable for the average layman to hold a pill in his hand and know that he had the pill but still be ignorant of what the pill actually was. It is entirely plausible (and in fact may be constitutionally required) that the legislature intended both aspects of the *mens rea* element of knowledge in the possession violation since otherwise they would be punishing as a felon, one who came into factual and manual possession of contraband but

²⁰ See *Rutskin v. State*, 260 So. 2d 565 (Fla. 1st DCA 1972); See also *Chicone v. State*, 684 So. 2d 736 (Fla. 1996) (guilty knowledge is an element of possession). In *Chicone* the Supreme Court defined the elements of constructive possession that apply if the defendant has no control over the place where the contraband is found. See: Standard Jury Instructions-Criminal Cases, 765 So.2d 692 (Fla. 2000).

6–202 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[A][3.]

was unaware of its *nature*. In many cases, such as weapons, counterfeit implements, burglary tools, etc., the article itself may give a clue to its nature. In *Medlin*, it is possible that the court took the defendant’s statement that the pill would make the girl “go up” as evidence of his knowledge of the *nature* of the article. In fact there is a statement in the case substantially to that effect. If that is so, then the case could be authority for the proposition that the possession violation requires the following *mens rea* elements:

1. General criminal intent^{20a}
2. Knowledge of the fact of possession.
3. Knowledge of the nature of what is possessed.

Regardless of the meaning of the *Medlin* case there are other cases in Florida which indicate either expressly or by implication that knowledge is a definite element of this offense.²¹

Addressing itself essentially to this issue the case of *Rutskin v. State*.²² offers the most definitive statement when it quotes from 91 A.L.R.2d 821, as follows:

Knowledge of the alleged possessor, or his intent to possess is not mentioned by the language of § 2 of the Uniform Narcotic Drug Act as an element of the offense prohibited, which is merely stated to be any possession of a narcotic drug not authorized by the act. However, no case has been found in which the defendant’s conviction of illegal possession of narcotics has been sustained where the prosecution has failed to prove, either directly or by inference, that the defendant had knowledge of the presence of the contraband substance.. . .

Of course, where the contraband has been discovered under such circumstances that an inference may be raised that the defendant had the requisite control and knowledge, only the jury can determine whether the state has carried its burden.²³ In other words, the question of intent is always

^{20a} Compare above note 19.

²¹ See Footnote 2; Compare *Johnston v. State*, 343 So. 2d 110 (Fla. 2d DCA 1977) where the court held that defendant’s knowledge need not be of the nature of the drug (emphasis added); *But see Longshaw v. State*, 343 So. 2d 1290 (Fla. 3d DCA 1977) where the court held that the state must still prove the nature of the substance.

²² *Rutskin v. State*, 260 So. 2d 525 (Fla. 1st DCA 1972); See generally, *Ramirez v. State*, 371 So. 2d 1063 (Fla. 3d DCA 1979); *Yager v. State*, 370 So. 2d 1230 (Fla. 4th DCA 1979).

²³ See *Huntley v. State*, 267 So. 2d 374 (Fla. 4th DCA 1972) relating to possession

§ 6.3[A][3.]

DRUG OFFENSES

6–203

demonstrated by circumstantial evidence and is always a question of fact unless the court can rule as a matter of law that the state has failed to make a sufficient showing. For example, in one case the police stopped the defendant who consented to a search which revealed marijuana under the driver's side of the dashboard. The defendant owned the car and was alone at the time. The defendant denied that he knew about the presence of the drug. The court held that it was a jury question as to whether the defendant had the necessary knowledge and control.²⁴

In cases of joint or non-exclusive possession of the premises the state has an even more difficult burden to demonstrate these elements. According to one judge, “the burden that the state bears in this regard is a heavy one. . . .”²⁵ In some cases of such joint occupancy the state is disabled to raise an inference of knowledge and control.²⁶

In an instance where the possession of the premises is nonexclusive, and drugs are found therein, “. . . the state must present other evidence which forms a reasonable basis for an inference that defendant knew the presence of the drugs. By other evidence is meant evidence other than the evidence of the defendant's non-exclusive possession of the premises.”²⁷ Not all equivocal factual situations result happily for the accused, however. In one instance, where the defendant was drunk at the time of the alleged possession of marijuana he argued that it could not be shown that he “knowingly or intentionally” possessed marijuana because there were opportunities to plant the marijuana cigarettes on his person, the court held that the jury did not have to agree with this proposition merely because

by circumstantial evidence; *see also* *Parker v. State*, 641 So. 2d 483 (Fla. 5th DCA 1994) (motorist held to be in possession of cocaine found in the vehicle). *Brown v. State*, 483 So. 2d 743, 745 (Fla. 5th DCA 1986) (fingerprint on drug container led to the defendant's conviction); footnote 31.

²⁴ *Russ v. State*, 279 So. 2d 92 (Fla. 3d DCA 1973); *see also* *Mishmash v. State*, 423 So. 2d 447 (Fla. 1st DCA 1982) (the mere presence of the odor of marijuana is not sufficient evidence of knowledge); *Briggs v. State*, 262 So. 2d 451 (Fla. 3d DCA 1972).

²⁵ *See* dissent in *Mancini v. State*, 179 So. 2d 346 (Fla. 4th DCA 1973). *See also* *Maisler v. State*, 425 So. 2d 107, 108 (Fla. 1st DCA 1982) (the state must prove knowledge and control beyond a reasonable doubt).

²⁶ *Smith v. State*, 279 So. 2d 27 (Fla. 1973); *see also* footnote 31.

²⁷ *Molinaro v. State*, 360 So. 2d 119 (Fla. 3d DCA 1978); *Davis v. State*, 350 So. 2d 834 (Fla. 2d DCA 1977); *Willis v. State*, 320 So. 2d 823 (Fla. 4th DCA 1975); *Taylor v. State*, 319 So. 2d 114 (Fla. 2d DCA 1975); *Griffin v. State*, 276 So. 2d 191 (Fla. 4th DCA 1973).

6–204 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[B]

there were opportunities, at least in the absence of something else like motive or attempt by another to escape detection.²⁸

The element of guilty knowledge sufficient for “possession” was found by one court based on inferences it considered incompatible with innocence, which were raised from the circumstantial fact of the defendant’s flight.²⁹

In one unfortunate decision³⁰ however, a court upheld a conviction for possession of drugs where the lower court refused to instruct the jury on the requisite knowledge of the presence of the drugs. This was so even though defendant requested the court to instruct the jury as to the knowledge requirement, and the jury specifically asked if defendant would be guilty if he had no such knowledge.

B. Constructive Possession

[1.]—Generally

It has been stated that constructive possession exists where a person without the manual possession of an item knows of its presence on or about his or her premises, the ability to maintain control over the same,³¹ and the knowledge of the illicit nature of the substance.^{31a} In other words, the

²⁸ Broic v. State, 79 So. 2d 775 (Fla. 1955); *See also* Ramirez v. State, 371 So. 2d 1063 (Fla. 3d DCA 1979).

²⁹ Betancourt v. State, 228 So. 2d 124 (Fla. 3d DCA 1969).

³⁰ Johnson v. State, 362 So. 2d 430 (Fla. 4th DCA 1978).

³¹ Shad v. State, 394 So. 2d 1114 (Fla. 1st DCA 1981), *review denied*, 402 So. 2d 613 (Fla. 1981); Hewitt v. State, 393 So. 2d 603 (Fla. 1st DCA 1981); Norman v. State, 362 So. 2d 444 (Fla. 1st DCA 1978); Ellis v. State, 346 So. 2d 1044 (Fla. 1st DCA 1977); Jordan v. State, 344 So. 2d 1294 (Fla. 3d DCA 1977); Dixon v. State, 343 So. 2d 1345 (Fla. 2d DCA 1977); Hively v. State, 336 So. 2d 127 (Fla. 4th DCA 1976); Britton v. State, 336 So. 2d 663 (Fla. 1st DCA 1976); Hilding v. State, 291 So. 2d 111 (Fla. 4th DCA 1974); Medlin v. State, 279 So. 2d 41 (Fla. 4th DCA 1973); *see also* Davis v. State, 350 So. 2d 834 (Fla. 2d DCA 1977), where the court held that knowledge was a necessary element for a conviction of constructive possession, but that circumstantial evidence was sufficient to prove this knowledge.

^{31a} *See* Lloyd v. Satte, 677 So. 2d 76 (2nd DCA 1996); Sheppard v. State, 713 So. 2d 1057 (1st DCA 1998); and Grady v. State, 753 So. 2d 744 (3rd DCA 2000) *citing* Williams v. State, 529 So. 2d 345, 347 (Fla. 1st DCA 1988); Brown v. State, 428 So. 2d 250, 252 (Fla. 1983), *cert. den.*, 463 U.S. 1209 (1983); *see also* Johnson v. State, 650 So. 2d 89, 90 (Fla. 4th DCA 1995) (an instruction to this effect must be given to the jury if requested). *Compare* Rubiano v. State, 528 So. 2d 1262 (Fla. 4th DCA 1988) (knowledge of its illicit nature could be inferred from the fact that the defendant admitted he knew of the presence of [cocaine] packages in his luggage).

§ 6.3[B][1.]

DRUG OFFENSES

6–205

accused may be said to have constructive possession of a chattel where he or she has knowledge of its presence coupled with the ability to maintain control over it or reduce it to physical possession, even though the person did not have actual personal dominion.³² Where two or more persons are in constructive joint possession of contraband, the state need not prove that either of them actually possessed it.^{32a}

Based on the definition contained in the Florida cases, it would seem that the problem of constructive possession arises in any prosecution for “Possession” where the facts do not indicate some manual or personal and actual dominion over the contraband. This would then include cases of exclusive, nonexclusive, and joint possession of the premises.

However, merely *touching* drugs for the purposes of either verifying its identity, or weighing it for a third-party purchase, does not constitute possession.^{32b}

Constructive possession may be proven by means of circumstantial evidence that outweighs all reasonable hypotheses of innocence.³³

In 1999 the Fourth District Court of Appeals found that the state failed to prove the defendant had constructive possession of marijuana, even though the defendant owned and was driving the car in which the marijuana was found, and thus the trial court should have granted the defendant a judgment of acquittal on possession of cannabis charge; there was no evidence that the defendant knew of the illicit nature of a marijuana cigarette or that she knew it was in her presence, the officer testified that he did

³² State v. Connelly, 748 So.2d 248 (Fla. 1999) held that the double jeopardy clause did not prohibit the defendant from being convicted of both introducing or possessing contraband upon the grounds of a county detention facility and possession of cannabis; prosecution in respect to the first count was solely for the act of introduction, and prosecution on the second count was for the act of simple possession; Daudt v. State, 368 So. 2d 52 (Fla. 2d DCA 1979); Frank v. State, 199 So. 2d 177 (Fla. 1st DCA 1967); Spataro v. State, 179 So. 2d 873 (Fla. 2d DCA 1965); *see also* State v. Brider, 386 So. 2d 818 (Fla. 2d DCA 1980) (defendant directed where marijuana should be delivered, and helped unload it). *Compare* Ivey v. State, 420 So. 2d 613, 614 (Fla. 4th DCA 1982) (the accused must have dominion and control over the contraband).

^{32a} Armbruster v. State, 453 So. 2d 833 (Fla. 4th DCA 1984).

^{32b} *See* Garces v. State, 485 So. 2d 847 (Fla. 3d DCA 1986), *verifying* Roberts v. State, 505 So. 2d 547 (Fla. 3d DCA 1987) (weighing).

³³ D.K.W. v. State, 398 So. 2d 885 (Fla. 1st DCA 1981); Davis v. State, 350 So. 2d 834 (Fla. 4th DCA 1974); *see also* Thompson v. State, 375 So. 2d 633 (Fla. 4th DCA 1979).

6–206 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[B][2.]

not know if the cigarette had been smoked, and the evidence failed to exclude the possibility that the marijuana belonged to the defendant's passenger.^{33a}

[2.]—Exclusive Possession

As a general proposition, it may be stated that if the premises on which the drugs are found is in the exclusive possession and control of the accused, knowledge of the presence on such premises, coupled with his ability to maintain control over them, may be inferred.³⁴ However, this inference must be reasonable from proven facts, and not based on other inferences.³⁵

In *Brown v. State*,^{35a} the Supreme Court of Florida extended this area of the law. There, the court held that the elements of knowledge and control are satisfied where a resident owner or occupant is present and where drugs are found in plain view in a common area. However, where there is another co-owner or co-occupant also present, neither person has the right to control the contraband if it belongs to the other co-owner or co-lessee. In such a case, there should be no case for constructive possession, since it is not inconsistent with the reasonable hypothesis that the drugs belong to the other person.^{35b}

^{33a} *Thomas v. State*, 743 So.2d 1190 (4th DCA 1999).

³⁴ *See* *Wale v. State*, 397 So. 2d 738 (Fla. 4th DCA 1981); *Thompson v. State*, 375 So. 2d 633 (Fla. 4th DCA 1979); *Daudt v. State*, 368 So. 2d 52 (Fla. 2d DCA 1979); *Thames v. State*, 366 So. 2d 1261 (Fla. 1st DCA 1979); *Sindrich v. State*, 322 So. 2d 589 (Fla. 1st DCA 1975); *Willis v. State*, 320 So. 2d 823 (Fla. 4th DCA 1975); *Frank v. State*, 199 So. 2d 117 (Fla. 1st DCA 1967); *Spataro v. State*, 179 So. 2d 873 (Fla. 2d DCA 1965); *see also* *Gatrell v. State*, 626 So. 2d 1364 (Fla. 1993); *Williams v. State*, 527 So. 2d 1234 (Fla. 1st DCA 1988) (possession may be shown by one's exclusive access to a particular area); *Brayton v. State*, 425 So. 2d 88 (Fla. 1st DCA 1982) (defendant in exclusive possession of rental truck). *Compare* *Jones v. State*, 589 So. 2d 1001–1003 (Fla. 3d DCA 1991) (whereas the quantity of drugs possessed is generally immaterial, trace amounts of drug "lint" or "dust" do not impute knowledge to the possessor).

³⁵ *Sindrich v. State*, 322 So. 2d 589 (Fla. 1st DCA 1975); *see also* *Lupper v. State*, 663 So. 2d 1337 (Fla. 4th DCA 1994) (possession of cocaine residue in beer can was imputed to the owner of the can).

^{35a} *Brown v. State*, 428 So. 2d 250 (Fla. 1983). *See also* *Green v. State*, 602 So. 2d 1306, 1310 (Fla. 4th DCA 1992) (thus proving general intent). *Compare* *Broers v. State*, 606 So. 2d 480, 482 (Fla. 2d DCA 1992) (not if the contraband is concealed).

^{35b} *See also* *Williams v. State*, 489 So. 2d 1198 (Fla. 1st DCA 1986) (no exclusive possession where the defendant's daughter was often an overnight guest on the premises in question, and had ample opportunity to hide the contraband in question); *Muwwakil v. State*, 435 So. 2d 304, 305 (Fla. 3d DCA 1983).

§ 6.3[B][2.]

DRUG OFFENSES

6–207

The jury may also consider incriminating statements and circumstances in inferring defendant's knowledge of the presence of drugs on the premises.³⁶

Obviously, this inference may be overcome by evidence of a contrary nature produced by the defendant.³⁷ In one case involving the exclusive possession of the automobile in which marijuana had been found, the owner's denial of the knowledge of the presence of the marijuana was considered only to raise a jury question on the issue.³⁸ In *Stanley v. State*,^{38a} however, the defendant's conviction for trafficking by constructive possession was upheld where he closely inspected the marijuana delivered to him in a van, and then took possession of the van. Similarly, in *Wetzler v. State*,^{38b} the defendant was properly convicted of possession of drugs contained in a travel trailer, where he thought the situation was "just a little bit shady," but chose to remain ignorant of the trailer's contents. The court adopted the doctrine of "willful blindness"—"where a party has his suspicion aroused but then deliberately omits to make further inquiries because he wishes to remain in ignorance, he is deemed to have knowledge."

However, mere proximity to contraband is insufficient to infer possession.^{38c} For instance, in *Johnson v. State*,^{38d} the court held that the fact that the defendant was alone in another's apartment in which heroin was found was insufficient to support a constructive possession theory.

It is also important to note that where contraband is found near a suspect in a public place, no constructive possession arises. There must exist

³⁶ Tomlin v. State, 333 So. 2d 500 (Fla. 2d DCA 1976); Sindrich v. State, 322 So. 2d 589 (Fla. 1st DCA 1975); Willis v. State, 320 So. 2d 823 (Fla. 4th DCA 1975).

³⁷ Sindrich v. State, 322 So. 2d 589 (Fla. 1st DCA 1975); Russ v. State, 179 So. 2d 92 (Fla. 3d DCA 1973).

³⁸ Russ v. State, 179 So. 2d 92 (Fla. 3d DCA 1973).

^{38a} Stanley v. State, 451 So. 2d 897 (Fla. 4th DCA 1984).

^{38b} Wetzler v. State, 455 So. 2d 511 (Fla. 1st DCA 1984). Compare Sindrich v. State, 322 So. 2d 589 (Fla. 1st DCA 1975). But see note 38d, below.

^{38c} Johnson v. State, 456 So. 2d 923 (Fla. 3d DCA 1984).

^{38d} Johnson v. State, 456 So. 2d 923 (Fla. 3d DCA 1984). See also Harris v. State, 501 So. 2d 735 (Fla. 3d DCA 1987) (going along for the ride while knowing one's companions are trafficking in drugs does not constitute possession); Cortez v. State, 488 So. 2d 163 (Fla. 1st DCA 1986) (defendant, who was merely present in a house in which drugs were found concealed in cardboard boxes, could not be convicted of possession). Compare below note 48.

6-208 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[B][3.]

evidence, such as fingerprints or the like, to tie the suspect to the contraband.^{38E}

An interesting situation is presented, however, where a lone individual is driving an automobile which was previously driven by others. Whereas the individual is in exclusive possession *temporarily*, it is, or has been, possessed by others as well. It would appear that under such circumstances the constructive possession doctrine should not apply to contraband found in the vehicle unless some independent evidence exists to tie the driver to it; since a “reasonable hypothesis of innocence” exists that a prior driver placed the contraband in the vehicle.^{38f}

[3.]—Joint Possession

This particular problem seems to be the one around which most of the trial “in-fighting” has occurred. Since it is largely a matter of circumstantial evidence which depends on whatever inferences may be generated therefrom for its relevancy, it is to be anticipated that factual distinctions, rather than legal pronouncements, will be the major determinant of the problem. That this is true can be seen from an analysis of the Florida opinions that have examined the question.

First, however, as a general rule, it may be stated that if the premises on which the drugs are found is not in the exclusive (but only the joint possession) possession of the accused, knowledge of the drugs’ presence on the premises and the ability to maintain control over them by the accused will not be inferred, but must be established by proof.^{38g} Such proof may

^{38E} Collier v. State, 509 So. 2d 971 (Fla. 2d DCA 1987).

^{38f} See State v. Rodriguez, 531 So. 2d 415 (Fla. 3d DCA 1988). *Cf. above* note 38d. *But see* the unfortunate decision in State v. Burke, 531 So. 2d 416 (Fla. 4th DCA 1988). *Compare* Parker v. State, 641 So. 2d 483 (Fla. 5th DCA 1994) (when a motorist is in exclusive possession of a vehicle, his knowledge of cocaine found therein may be inferred).

^{38g} See, e.g., Wale v. State, 397 So. 2d 738 (Fla. 4th DCA 1981). *See also* Delva v. State, 557 So. 2d 52 (Fla. 3d DCA 1989) (where the car the defendant was driving contained drugs, the court was required to instruct the jury that it had to find that he knew the drugs were present); Bradshaw v. State, 509 So. 2d 1306, 1308–1309 (Fla. 1st DCA 1987); Agee v. State, 522 So. 2d 1044, 1046 (Fla. 2d DCA 1988) (mere proximity to contraband is legally insufficient to prove possession).

In State v. Duran, 550 So. 2d 45 (Fla. 3d DCA 1989), the court held that generally the issue of knowledge is a jury question, and not a proper issue for a motion to dismiss).

§ 6.3[B][3.]

DRUG OFFENSES

6–209

consist either of evidence establishing actual knowledge of the accused, or evidence of incriminating statements and circumstances from which a jury might lawfully infer knowledge of the accused of the drugs' presence on the premises.³⁹ The inference in question here, of course, is the scienter of knowledge of the defendant based on the possession of the premises and that question is one that must be resolved by the jury under the evidence in the case and on proper instruction by the court embodying the elements of the general rule discussed *above*.⁴⁰

However, in *Brown v. State*,^{40a} the Supreme Court of Florida held that the elements of knowledge and control are satisfied where a *resident* owner or occupant is present and where drugs are found in plain view in a common area. Apparently, the court is placing a duty on residents and occupants to supervise their guests, and not allow them to indulge in drugs. This reasoning falls short, however, when an owner or occupant has many guests at a party. How can he supervise everyone all the time? Also, where there is more than one coowner or cooccupant present, neither person has the right to control the contraband if it belongs to the other person. In such

³⁹ *Molinaro v. State*, 360 So. 2d 119 (Fla. 3d DCA 1978); *Clark v. State*, 359 So. 2d 458 (Fla. 3d DCA 1978); *Brownlee v. State*, 354 So. 2d 120 (Fla. 3d DCA 1978); *Jordan v. State*, 344 So. 2d 1294 (Fla. 3d DCA 1977); *Britton v. State*, 336 So. 2d 663 (Fla. 1st DCA 1976); *Nast v. State*, 333 So. 2d 103 (Fla. 2d DCA 1976); *Moore v. State*, 325 So. 2d 466 (Fla. 4th DCA 1976); *Taylor v. State*, 319 So. 2d 114 (Fla. 2d DCA 1975); *Smith v. State*, 276 So. 2d 91 (Fla. 4th DCA 1973); *Langdon v. State*, 235 So. 2d 321 (Fla. 3d DCA 1970); *Frank v. State*, 199 So. 2d 117 (Fla. 1st DCA 1967).

⁴⁰ *See Reiss v. State*, 248 So. 2d 666 (Fla. 3d DCA 1971). For what the court called “evidence of incriminating statements and circumstances from which a jury might lawfully infer knowledge by the accused of the drugs' presence on the premises.” The narcotics had been found in a pocketbook of questioned ownership.

^{40a} *Brown v. State*, 428 So. 2d 250 (Fla. 1983); *see also Clark v. State*, 670 So. 2d 1061 (Fla. 2d DCA 1996) (being a co-tenant was sufficient to show dominion and control over a drawer in which drugs were found); *Fedor v. State*, 483 So. 2d 42 (Fla. 2d DCA 1986) (defendant, the owner and driver of an automobile, was held to be in constructive possession of “roaches” found in his ashtray, notwithstanding that a passenger was present); *State v. Becker*, 559 So. 2d 704 (Fla. 4th DCA 1990)(constructive possession found where drugs were located in a closet of a room rented solely by a defendant, even where others had access to it); *Scott v. State*, 559 So. 2d 269, 274 (Fla. 4th DCA 1990)(drugs found in a closet of a bedroom shared by the defendant and another, where business cards of the defendant were also found). *Compare Moffatt v. State*, 583 So. 2d 779, 781–782 (Fla. 1st DCA 1991) (ownership of drugs found under a cooler in a vehicle could not be imputed to the driver/owner thereof since the passenger had access to placing them there).

6–210 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[B][3.]

a case, there should be no case for constructive possession against either, since it is not inconsistent with the reasonable hypothesis that the drugs belong to the other person.^{40B}

Subsequent to the *Brown* decision, the First District Court of Appeal decided *Chappell v. State*.^{40c} In that case, the court distinguished *Brown* in holding that drugs found in manila envelopes on a dining room table were not in “plain view.” Consequently, the joint occupants of the residence could not be considered to be in constructive possession of the drugs.

One important Florida case⁴¹ has indicated that the mere joint possession of the premises on which the contraband material has been found does not produce a sufficient demonstration of possession, in the absence of incriminating statements by the defendant or other circumstances from which the jury might reasonably infer knowledge. Several examples of this principle have been illustrated by the cases. In one case⁴² where the possession of lottery tickets was in question, the contraband was seized in the defendant’s bedroom that was also occupied by her boyfriend at the time. Here, the court distinguished the *Frank* and *Markman* cases on the ground that the mere presence of the boyfriend did not establish joint control as a matter of law and even if it did, there was a distinction based on the difference in the nature and amount of the contraband.

In another case, four persons had joint possession of a two bedroom residence. The contraband was located in a closet of one bedroom and also

^{40B} See *Muwwakil v. State*, 435 So. 2d 304, 305 (Fla. 3d DCA 1983).

^{40c} *Chappell v. State*, 457 So. 2d 1133 (Fla. 1st DCA 1984); see also *Broers v. State*, 606 So. 2d 480, 482 (Fla. 2d DCA 1992) (contraband was concealed from plain view); *Bradshaw v. State*, 509 So. 2d 1306, 1309 (Fla. 1st DCA 1987).

⁴¹ *Markman v. State*, 210 So. 2d 486 (Fla. 3d DCA 1968); see also *Thompson v. State*, 375 So. 2d 633 (Fla. 4th DCA 1979); *Falin v. State*, 367 So. 2d 675 (Fla. 3d DCA 1979).

⁴² *Lattimore v. State*, 214 So. 2d 771 (Fla. 3d DCA 1968). Compare *Clark v. State*, 359 So. 2d 458 (Fla. 3d DCA 1978), where the court held that where the bedroom was jointly occupied by a husband and wife, knowledge of and control over drugs found in a container in a drawer could not be inferred to either person. The court based its holding on the fact that the inference of knowledge was not inconsistent with the reasonable hypothesis of innocence.

The difference in the holdings of the two cases seems to stem from the fact that in the *Lattimore* case the boyfriend was only an occupant “at the time,” implying him as a guest. As such he would not have had the ability to exercise control over the apartment. The apartment, then, was under the exclusive control of the defendant, and was not jointly controlled.

§ 6.3[B][3.]

DRUG OFFENSES

6-211

in the drawers of a chest in the same bedroom. No evidence indicated that the defendant had exclusive control over that particular bedroom. There was no evidence that the defendant exclusively controlled the chest or the closet. There the Fourth District Court of Appeal ruled that “where drugs are found on premises in joint possession, the proof must establish both the accused’s knowledge of the drugs’ presence and his ability to maintain control over them.”⁴³ It should be noted that this case distinguished that of *Spataro v. State*, 179 So. 2d 873, where the defendant also shared a bedroom, since in the *Spataro* case the evidence adduced showed which drawer and closet the defendant used.

In a rather distressing case involving the question of the premises being occupied jointly by a husband and wife the bedroom was the locale of the execution of the search warrant. Drugs were located in the dresser drawer in the bedroom which drawer also contained costume jewelry belonging to the wife. As a result, of this disclosure, the husband was charged with possession. The First District Court of Appeal determined that the husband

. . . was assumed to be the head of the household and certainly he had control, actual as well as constructively, and the fact that only his wife and he were occupants of the room, are circumstances which we think are sufficient to raise an inference that the appellate had knowledge of the incriminating evidence.⁴⁴

Fortunately, however, on conflict certiorari the Supreme Court of Florida determined that knowledge cannot be imputed to the husband on the basis that the husband is head of the household. Said the court, “the continuing expanded independence of the wife casts a different light upon the husband’s control, and thus inferred knowledge in these circumstances.”⁴⁵

In similar vein, a search warrant was executed on an apartment belonging to a paramour but occupied only periodically by the defendant. Under these circumstances it was determined that the state had failed to prove either elements of knowledge or control.⁴⁶

⁴³ Smith v. State, 276 So. 2d 91 (Fla. 4th DCA 1973). Compare *Thames v. State*, 366 So. 2d 1261 (Fla. 1st DCA 1979).

⁴⁴ Smith v. State, 265 So. 2d 538 (Fla. 1st DCA 1972).

⁴⁵ Smith v. State, 279 So. 2d 27 (Fla. 1973).

⁴⁶ Mosley v. State, 281 So. 2d 590 (Fla. 4th DCA 1973). See also *Williams v. State*, 489 So. 2d 1198 (Fla. 1st DCA 1986) (no exclusive possession where the defendant’s daughter was often an overnight guest, and had ample opportunity to conceal the contraband in question).

6–212 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[B][3.]

In another case officers found a juvenile in a house belonging to another, the juvenile girl being in bed with the adult owner. Next to the bed there was a warm water pipe, apparently containing marijuana residue. The juvenile was charged with an act of delinquency based on her constructive possession of the water pipe but the Appellate Court stated, “. . .in order to constitute constructive possession there must be more than mere suspicion of one having used the paraphernalia. There must, at a minimum, have been some joint control of the premises wherein the paraphernalia was found.”⁴⁷ Parenthetically, it should be noted that this case also holds that the state must allege particular violation of the law in Petition of Delinquency and that the allegation must be proved beyond a reasonable doubt even though the minor is within the jurisdiction of the Juvenile Court.

Where the defendant was a passenger on a ship, the odor of marijuana in the forward cabin and a slight amount of marijuana scattered over the vessel’s deck were not sufficient to render him in constructive possession of the contraband. The owner was also present. In *Metzger v. State*,^{47A} the court held that evidence of the defendant’s knowledge of, and ability to control, the marijuana did not exclude every reasonable hypothesis of innocence.

Possession remains the key to this area, however; and although the premises are owned by another, defendant may still be considered to be in exclusive possession thereof.⁴⁸ The presumption that one in exclusive possession of certain premises is in possession of contraband found thereon has been held valid even where there was another person present when the search was conducted, according to one court.⁴⁹ If the drugs involved in the *Norris* case were found in such a place as the visitor was not likely to have had access to, then it is logical to impute the knowledge of and ability to control them to the exclusive occupant. On the other hand, if the

⁴⁷ D.M.M. v. State, 275 So. 2d 308 (Fla. 2d DCA 1973).

^{47A} *Metzger v. State*, 395 So. 2d 1259 (Fla. 3d DCA 1981). For other cases holding that no constructive possession existed, see *D.K.W. v. State*, 398 So. 2d 885 (Fla. 1st DCA 1981) (dominion negated by co-defendant’s admission of ownership of contraband); *Hall v. State*, 382 So. 2d 742 (Fla. 2d DCA 1980) (no proof that defendant had knowledge of, and ability to control, contraband); *Caynus v. State*, 380 So. 2d 1174 (Fla. 4th DCA 1980) (no evidence linking an individual to briefcase in which contraband was found).

⁴⁸ *Norman v. State*, 362 So. 2d 444 (Fla. 1st DCA 1978); *Norris v. State*, 351 So. 2d 729 (Fla. 3d DCA 1977). Compare above note 38d.

⁴⁹ *Norris v. State*, 351 So. 2d 729 (Fla. 3d DCA 1977).

drugs were found in plain view, or in a place where the visitor might have placed them thinking he again would gain access to remove them, then this presumption does not exclude all reasonable hypotheses of innocence. However, the court does not tell us where the drugs were found.

In the case of *Doby v. State*,^{49a} the First District Court of Appeal followed logic in holding that drugs found secreted in defendant's wheelchair alone was insufficient to show possession, since others had access to the chair. This idea of joint access seems much more logical than requiring joint possession to negate the presumption of possession, since we are dealing with the circumstantial evidence requirement that the evidence presented exclude all reasonable hypotheses of innocence.

And in *State v. Savarino*,^{49b} constructive possession of drugs located on the passenger's side of the floor of an automobile owned by a person other than the driver was found to exist. But there, the defendant was the sole occupant of the vehicle; he had to enter from the passenger side due to an inoperable driver's door, and had failed field sobriety tests and yet had a breathalyzer reading of .00.^{49c}

As for presuming a guest to be in constructive possession of drugs lying in plain view in another's premises, one court⁵⁰ held that this is invalid, since the guest has no ability to control something on another's property. The plain view aspect only showed that the guest had knowledge of the presence of the drugs, which was insufficient to sustain a conviction for possession. There must, then, be other evidence from which a jury might

^{49a} *Doby v. State*, 352 So. 2d 1236 (Fla. 1st DCA 1977). See also *Williams v. State*, 573 So. 2d 124, 126–127 (Fla. 4th DCA 1991) (no constructive possession where the defendant was found seated in public in a chair in which drugs were found).

^{49b} *State v. Savarino*, 381 So. 2d 734 (Fla. 2d DCA 1980). Compare *Wells v. State*, 570 So. 2d 346, 348 (Fla. 2d DCA 1990) (no constructive possession existed for drugs found secreted in a vehicle where the defendant was the driver but the owner was also present); *McClain v. State*, 559 So. 2d 425 (Fla. 4th DCA 1990) (no constructive possession found where drugs were found under a passenger's seat, in a bag which had the fingerprints of the defendant as well as others, where his prints were not found on the drug container found inside the bag); *above* note 40a.

^{49c} See also *State v. Cramer*, 383 So. 2d 254 (Fla. 2d DCA 1980) (defendant and another shared a dresser on which contraband was found, but the defendant's gun was located next to the drugs; constructive possession was found).

⁵⁰ *Britton v. State*, 336 So. 2d 663 (Fla. 1st DCA 1976). See also *Green v. State*, 460 So. 2d 986 (Fla. 4th DCA 1984).

6-214 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[B][3.]

infer possession, this may be found in considering incriminating statements and circumstances.⁵¹

The automobile cases present a similar difficulty. In one instance,⁵² the defendant was one of eight occupants of a bus in which a small quantity of marijuana was found. The defendant admitted that he and three others lived in the bus, but that he did not own the bus. This evidence, without more, according to the court, fails as a matter of law, to establish possession. In another case⁵³ one court held that even if defendant owned the vehicle in which drugs were found in an unlocked center console, no presumption of possession would arise since there were others in the vehicle who also had access to the console. The court reiterated that for the presumption to arise the premises in question must be under the exclusive control of defendant. However, if the console were locked and defendant possessed the only key to it, the result would of course be different.

More recently, however, in *Fedor v. State*,^{53a} the Second District Court of Appeal held that the defendant, the owner, and the operator of the vehicle in question was in constructive possession of “roaches” found in his ashtray notwithstanding that a passenger was also present. This decision is apparently more in line with that of the Supreme Court of Florida in *Brown v. State*.^{53b} Distinguished from this situation, however, is the case of *Zicca v. State*,⁵⁴ in which the marijuana was in open view on a homemade shelf behind the passenger side of the vehicle and in a plastic container. In that case, the defendant was the owner and operator of the bus at the time of the arrest.

⁵¹ Tomlin v. State, 333 So. 2d 500 (Fla. 2d DCA 1976); Sindrich v. State, 322 So. 2d 589 (Fla. 1st DCA 1975); Willis v. State, 320 So. 2d 823 (Fla. 4th DCA 1975).

⁵² Langdon v. State, 235 So. 2d 321 (Fla. 3d DCA 1970); *See also* Manning v. State, 355 So. 2d 166 (Fla. 4th DCA 1978); Townsend v. State, 330 So. 2d 513 (Fla. 4th DCA 1976) Thiel v. ZState, 326 So. 2d 460 (Fla. 2d DCA 1976); Moore v. State, 325 So. 2d 466 (Fla. 4th DCA 1976).

⁵³ Manning v. State, 355 So. 2d 166 (Fla. 4th DCA 1978). Murphy v. State, 511 So. 2d 397, 399 (Fla. 4th DCA 1987).

^{53a} Fedor v. State, 483 So. 2d 42 (Fla. 2d DCA 1986); *see also* State v. St. Jean, 658 So. 2d 1056 (Fla. 5th DCA 1995) (both the driver and a passenger constructively possessed drugs found in a vehicle where both fled the scene). *Compare* In re E.H., 579 So. 2d 364, 365 (Fla. 4th DCA 1991) (no constructive possession existed where there were two occupants of the vehicle); *above* note 40a.

^{53b} *See above* note 40a.

⁵⁴ Zicca v. State, 232 So. 2d 414 (Fla. 3d DCA 1970). *Compare above* note 47.

§ 6.3[B][3.]

DRUG OFFENSES

6–215

In a conflict certiorari case, it was determined that officers had occasion to question the defendant concerning possible motor vehicle violations and at the time observed smoke in the automobile. The defendant's female companion took a pack of Kool Cigarettes that was lying on the seat and put them in her purse. When asked for identification she opened the purse and the officer noticed a hand-rolled cigarette in the pack.^{54a} She crumpled this pack and dropped it in the car. The officer examined the pack of cigarettes and found marijuana. As a result of this examination, the defendant male driver was also arrested for possession of marijuana. The female testified that the cigarette was hers and that the defendant did not give it to her and that they had not been smoking marijuana. Under these circumstances, the Supreme Court of Florida held that the court should grant a directed verdict of acquittal as to the defendant since there was nothing to tie him directly to the contraband.⁵⁵

In what appears to be an unfortunate result, the Fourth District Court of Appeal affirmed a conviction for possession where the defendant was arrested in the early morning hours for "drunkenness by drugs" (but was later acquitted of that charge). He was driving a car belonging to another person and on the initial arrest the marijuana cigarette was found in a shoe in the car. The shoe did not belong to the defendant and was located on the floorboards behind the driver and hidden from view. Additionally, there was testimony by a former police officer who was present at the arrest that the cigarette had been "planted" by the arresting officer.⁵⁶

In a recent case,⁵⁷ the First District Court of Appeal has apparently attempted to carve out an exception to the general rule that if the premises on which drugs are found is not in the exclusive possession of the accused, possession will not be inferred. They held that since the contraband in question was in plain view in a motel room, this was sufficient to support an inference that defendant had constructive possession of it even though he was only a joint occupant.

^{54a} However, observing a hand-rolled cigarette has more recently been held insufficient to give rise to probable cause to search. *Caplan v. State*, 531 So. 2d 88, 91–92 (Fla. 1988).

⁵⁵ *Nagar v. State*, 277 So. 2d 257 (Fla. 1973).

⁵⁶ *Mancini v. State*, 279 So. 2d 346 (Fla. 4th DCA 1973).

⁵⁷ *Winchell v. State*, 362 So. 2d 992 (Fla. 3d DCA 1978); *see also* *Howell v. State*, 337 So. 2d 823 (Fla. 1st DCA 1976). *Compare* *Wade v. State*, 558 So. 2d 107 (Fla. 1st DCA 1990) (a visitor in a motel room in which drugs were found was not in constructive possession thereof).

6-216 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[B][3.]

Obviously, the fact that the drugs were in plain view would support an inference that the defendant had knowledge of their presence, but it does not logically follow that he had the ability to maintain control over the drugs as is required for possession.⁵⁸ Thus, the inference of possession does not exclude all reasonable hypotheses of innocence, failing the circumstantial evidence test previously discussed.

However, notwithstanding the fact that knowledge of the existence of contraband, coupled with the ability to maintain control of the *premises*, does not necessarily infer the ability to maintain control of *contraband found therein* (such as where it belongs to a roommate, etc.), the Supreme Court of Florida has held that such is the case. In *Brown v. State*,^{58a} the court held that where a joint *owner* or *resident*^{58b} has knowledge of the existence of contraband within his premises (such as where such contraband is in plain view), a jury may consider him to be in constructive possession of it.^{58c}

It must also be remembered when dealing with the problem of joint occupancy of a premises that the possession of the drugs may also be joint.⁵⁹ And whereas mere joint possession of the premises, as discussed above, should not automatically infer possession of drugs found therein, if there is other evidence indicating that each occupant has the requisite knowledge of the drugs' presence as well as the ability to maintain control over them then each may be convicted of possessing the same drugs. And where two or more persons are charged with joint constructive possession of contraband, the state need not prove that any one of them actually physically possessed it.^{59a}

⁵⁸ See *Molinario v. State*, 360 So. 2d 119 (Fla. 3d DCA 1978); *Clark v. State*, 359 So. 2d 458 (Fla. 3d DCA 1044); *Brownlee v. State*, 354 So. 2d 120 (Fla. 3d DCA 1978); *Ellis v. State*, 346 So. 2d 1044 (Fla. 1st DCA 1977); *Jordan v. State*, 344 So. 2d 1294 (Fla. 3d DCA 1977); *Britoon v. State*, 336 So. 2d 663 (Fla. 1st DCA 1976); *Taylor v. State*, 319 So. 2d 114 (Fla. 2d DCA 1975); *Camp v. State*, 293 So. 2d 114 (Fla. 4th DCA 1974); *Hilding v. State*, 291 So. 2d 111 (Fla. 4th DCA 1974).

^{58a} *Brown v. State*, 428 So. 2d 250 (Fla. 1983). See also above notes 35a–35b.

^{58b} As opposed to guests.

^{58c} It is also worth mentioning that circumstantial evidence must outweigh all reasonable hypotheses of innocence. This does not. Compare *Johnson v. State*, 456 So. 2d 923 (Fla. 3d DCA 1984) (the fact that the defendant was alone in another's apartment in which contraband was found was insufficient to support a conviction).

⁵⁹ *Smith v. State*, 363 So. 2d 21 (Fla. 3d DCA 1978).

^{59a} *Armbruster v. State*, 453 So. 2d 833 (Fla. 4th DCA 1984).

§ 6.3[B][4.]

DRUG OFFENSES

6–217

For additional examples see the footnote.^{59b}

In *Maisler v. State*,^{59c} the court held that knowledge and control must be proved beyond a reasonable doubt.

Where an attorney represents more than one defendant in a constructive possession case, he must be alert for the possibility of a conflict of interests. In such a case, the lawyer should either withdraw from his representation of one or more defendant's, or else directly advise the court of the conflict, and allow the court to ascertain whether to obtain a waiver or to substitute counsel.^{59d}

[4.]—Non-Exclusive Possession

One situation seems to be distinguished, at least on the surface, from the typical “joint possession of premises” cases. That is the situation in which ownership of the premises may be demonstrated but where many other persons other than the owner are using the facility in more than a casual fashion. In other words, ownership is not the legal equivalent of

^{59b} For a case holding that constructive possession existed, see *Brown v State*, 519 So. 2d 1045 (Fla. 4th DCA 1988)(drugs were found in a bathroom used by the defendant, his 13 year old son, and a male tenant; but the defendant was the landlord, and also possessed drugs in his bedroom).

For cases holding that constructive possession was not established, see *Torres v. State*, 520 So. 2d 78, 80 (Fla. 3d DCA 1988) (drugs found secreted in the hull of the defendant's boat, which was occupied by him and three other persons at the time, the drugs were at least five months old, and the boat had been purchased five months previously); *Agee v. State*, 522 So. 2d 1044,1046 (Fla. 2d DCA 1988) (drugs found behind a tree in public, 12 inches from the defendant, and he fled from the police); *Corson v. State*, 527 So. 2d 928 (Fla. 5th DCA 1988) (the defendant drove his vehicle to a place where a rear seat passenger purchased drugs); *Poiter v. State*, 525 So. 2d 472 (Fla. 5th DCA 1988) (being a passenger in a car in which a small amount of drugs was found on console, and in the trunk of which drugs were found); *Pennington v. State*, 526 So. 2d 87 (Fla. 4th DCA 198 7)(being present at the scene of a drug transaction and answering its in the white car over there); *Elias v. State*, 526 So. 2d 1014 (Fla. 2d DCA 1988) (the person who rented a motel room where drugs were found, where others had been in the room and had the ability to exercise control over it); *Ellis v. State*, 528 So. 2d 1327, 1328 (Fla. 5th DCA 1988) (being the wife of someone who controlled drug paraphernalia); *Williams v. State*, 529 So. 2d 345 (Fla. 1st DCA 1988)(the apartment in which drugs were found was in joint possession); *Dubose v. State*, 560 So. 2d 323 (Fla. 1st DCA 1990) (where a defendant was merely a visitor, more than mere proximity to contraband must be shown).

^{59c} *Maisler v. State*, 425 So. 2d 107,108 (Fla. 1st DCA 1982).

^{59d} *Davis v. State*, 461 So. 2d 291, 295 (Fla. 1st DCA 1985).

6-218 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[B][4.]

exclusive occupancy. An example of this may be presented by a case in which the defendant rented motel accommodations which were shared with other persons and which had apparently been used during the time in question by a number of people other than the two occupants of the room. The court made reference to the fact that none of the evidence placed the defendant (or codefendant who was allegedly living with the defendant) in the premises. According to the court the evidence was insufficient as a matter of law to establish possession.⁶⁰ What the holding would have been had it been found that the defendants actually were occupying the premises at the time in question can only be left to speculation. Logically, however, the results should not vary since under other circumstances the inferences produced by such evidence would still be equally as consistent with innocence as with guilt. In other words, mere ownership or right to possess the premises would not be sufficient to raise the inference of scienter beyond a reasonable doubt.

In another case the defendant's home was searched and he was subsequently charged with possession of certain drugs. The defendant was not present at the time of the search but his brother and two other persons were present in the home. Since the defendant had title to the home but did not have actual exclusive physical possession, the state contended for constructive possession. This they desired to be inferred from the fact that the defendant owned the house where drugs were found. According to the court:

When premises are not in the exclusive possession of one charged with drug possession, the state, in order to prove knowledge of the presence of the drugs, must present other evidence which forms a reasonable basis for an inference that the defendant knew of the presence of the drugs. By 'other evidence' is meant evidence other than evidence of the defendant's non-exclusive possession of the premises.⁶¹

Similarly, drugs were found in a house owned by the defendant but in which others were in and about the house and had been for at least seven days prior to the search. In addition, the defendant did not arrive at the premises until after the search warrant was in the process of being served. He admitted ownership of the premises and in fact told the officers to get off the property. The result in this case was precisely the same as in the paragraph above.⁶²

⁶⁰ Kirtley v. State, 245 So. 2d 282 (Fla. 3d DCA 1971); *See also* Falin v. State, 367 So. 2d 675 (Fla. 3d DCA 1979).

⁶¹ Medlin v. State, 279 So. 2d 41 (Fla. 4th DCA 1973).

⁶² Griffin v. State, 276 So. 2d 191 (Fla. 4th DCA 1973).

§ 6.3[B][5.]

DRUG OFFENSES

6–219

In a recent case⁶³ drugs were found secreted in defendant's wheelchair. The court held, however, that since others had "access" to the wheelchair that no knowledge of the drugs presence could be inferred to defendant from merely possessing the chair. Other evidence showing defendant's knowledge of the presence of the contraband would be necessary for this. (emphasis added).

This exclusive access approach seems considerably more logical than does exclusive possession for inferring knowledge of and the ability to maintain control over drugs found on one's premises, in one's automobile or otherwise. If others have access to the premises then the presumption of defendant possessing the contraband does not exclude all reasonable hypotheses of innocence and prove defendant's guilt beyond and to the exclusion of every reasonable doubt.

On the other hand, just because one does not own the premises upon which contraband was seized does not necessarily prevent the inferring of constructive possession to him. For example, in one case⁶⁴ a farm was owned by one other than defendant, but since defendant was renting the farm had "actual" knowledge of the presence of marijuana, and had the ability to maintain control over it he was deemed in constructive possession of it (emphasis added). However, the court further held that while defendant had possession of the drugs, this mere possession on the land of another was insufficient to infer an intent on the part of defendant to sell them.

Similarly, another court held that even though another person was present during the search, and a person other than defendant regularly paid the rent, defendant was still considered the exclusive occupant of the premises since he admitted being the owner and occupant and there was no evidence of any actual joint occupancy.⁶⁵ Defendant, then, was presumed to be in constructive possession of the drugs found therein.

[5.]—Conspirators

In *Priestly v. State*,^{65a} the Fourth District Court of Appeal held that where an individual engages in a conspiracy to possess or traffic in contraband, and where it is proved that any other co-conspirator had actual possession

⁶³ Doby v. State, 352 So. 2d 1236 (Fla. 1st DCA 1977).

⁶⁴ Norman v. State, 362 So. 2d 444 (Fla. 1st DCA 1978).

⁶⁵ Norris v. State, 351 So. 2d 729 (Fla. 3d DCA 1977).

^{65a} Priestly v. State, 450 So. 2d 289, 292 (Fla. 4th DCA 1984). Compare *Ras v. State*, 610 So. 2d 24 (Fla. 2d DCA 1992).

6–220 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[C]

of the drugs, all conspirators are deemed to have been in constructive possession as well.

C. Proximity Problem^{65b}

It should be obvious that mere physical presence on the premises in question is insufficient to establish the fact of possession, even where the contraband may be in plain view.⁶⁶ The fact of one's presence, or the suspicion thereof, can lead to unfortunate results. As an example, one officer made an arrest based solely on his suspicion that the defendant had earlier been in an apartment which he determined contained marijuana. Under these circumstances the court found that probable cause did not exist for the arrest for "possession" and that since the arrest was erroneous, any statements made by the defendant subsequent thereto, even though implicating him in a possessory violation, were inadmissible as "fruits of a poisonous tree."⁶⁷

In another instance, the defendant was driving an automobile that had been loaned to him by a friend and marijuana was found in a cigar box under the driver's seat, together with a leather bag which was hung on a leather string around the neck of the defendant. This was held to be possession on the part of the defendant, but a passenger in the same automobile, who was not the owner nor in control of the automobile, on whom was found no marijuana, could not be said to be in possession because of the lack of proof of scienter or knowledge.⁶⁸

According to the Fourth District Court of Appeal "merely having been present or being present where marijuana is found is not sufficient proof

^{65b} See also above § III, B, 3.

⁶⁶ *Borrego v. State*, 62 So. 2d 43 (Fla. 1952); see also *State v. Snyder*, 635 So. 2d 1057 (Fla. 2d DCA 1994) (no possession resulted even where the defendant had an interest to try the drug in question since the police interrupted prior to any possession on the defendant's part); *Brooks v. State*, 501 So. 2d 176 (Fla. 4th DCA 1987); *Britton v. State*, 336 So. 2d 663 (Fla. 1st DCA 1976); *Arant v. State*, 256 So. 2d 515 (Fla. 1st DCA 1972) where there could be no finding of possession from mere presence, in absence of knowledge of drugs, control of drugs and possession of the premises. The fact that defendant's fingerprint was found on a potato chip can in which marijuana plants were growing did not establish the possession either.

⁶⁷ *Betancourt v. State*, 224 So. 2d 378 (Fla. 3d DCA 1969).

⁶⁸ *Chariott v. State*, 226 So. 2d 359 (Fla. 3d DCA 1969). See also *Manning v. State*, 355 So. 2d 166 (Fla. 4th DCA 1978); *Townsend v. State*, 330 So. 2d 513 (Fla. 4th DCA 1976); *Thiel v. State*, 326 So. 2d 460 (Fla. 2d DCA 1976); *Moore v. State*, 325 So. 2d 466 (Fla. 4th DCA 1976).

§ 6.3[D]

DRUG OFFENSES

6–221

of possession where there is no exclusive possession of the premises.”⁶⁹ Consistent with that position the court reversed a conviction of a defendant driver who was charged with possession of marijuana based on marijuana which had been taken from the purse of a female passenger in the back seat of his automobile, which automobile was also occupied by two additional passengers. There was no evidence that the defendant was present when the marijuana was obtained nor that he had anything to do with its purchase.⁷⁰ In *Johnson v. State*,^{70a} the Third District Court of Appeals held that where an individual was alone in another’s apartment in which drugs were found, this did not support a conviction for constructive possession.

D. Procedure and Practice

The only possession prohibited by the statute is, of course, that which is unlawful. This raises the question as to whether the defendant has the initial burden of raising the lawfulness of his possession by way of defense or whether the prosecution must negative by allegation the possible exceptions which would make the defendant’s conduct lawful and therefore outside the statute. It has been suggested that if the defendant wishes to defend on the ground that he was in rightful possession of narcotics, he should allege this by way of defense, and that when he does so he is not necessarily being compelled to testify against himself.⁷¹ The distinction here, however, if there is one, must be one of determining whether the lawful conduct outside the statute is considered to be a mere exception to the operation of the statute or whether it is deemed to be an element of the offense. In a very significant case the Second District Court of Appeal has determined that in the twenty gram first offense misdemeanor provision of the statute, the burden is not on the defendant as a matter of defense to prove that he was first offender and that he was possessed of twenty grams or less of marijuana.⁷² In other words, the specific amount and a prior felony

⁶⁹ *Smith v. State*, 276 So. 2d 91 (Fla. 4th DCA 1973).

⁷⁰ *Spiegel v. State*, 269 So. 2d 694 (Fla. 4th DCA 1972).

^{70a} *Johnson v. State*, 456 So. 2d 923 (Fla. 3d DCA 1984).

⁷¹ *Chavez v. State*, 215 So. 2d 750 (Fla. 2d DCA 1968).

⁷² *Pope v. State*, 268 So. 2d 173 (Fla. 2d DCA 1972). *See also* *Patterson v. State*, 313 So. 2d 712 (Fla. 1975) but the Supreme Court was still construing old Florida Statute 404.15; and *Brack v. State*, 293 So. 2d 108 (Fla. 2d DCA 1974) where the court held that since failed to allege possession of more than five grams it only constituted a misdemeanor, and so the circuit court had no jurisdiction.

6-222 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[D]

conviction are considered elements of the offense which must be alleged and proved and not exceptions to guilt which must be raised defensively. This appears to be another way of talking about jurisdictional and non-jurisdictional elements of the statute.⁷³ To the same effect is a decision from the Fourth District Court of Appeals where the information charged a defendant with unlawful Delivery under FLA. STAT. § 404.02 but failed to allege: “(1) That the defendant had been previously convicted of a violation of the Drug Abuse Law, or, (2) That the delivery was for consideration, or, (3) The amount of marijuana delivery exceeded [twenty] grams.^{73a} According to the court, “at least one of these allegations would necessarily have to be contained in the information in order to constitute the crime a felony under § 404.15”⁷⁴

The new Florida Statute, in § 893.10 entitled “Burden of Proof,” contains the assertion that exemptions or exceptions under the statute are a matter of “. . . going forward with the evidence . . .” as far as the defendant claiming their benefit is concerned. This provision does not alter the result reached in the paragraph above, since elements of the offense are a matter of fundamental jurisdiction of the court, which is beyond the authority of the statute.^{74a}

Regardless of whether the matter is characterized as an affirmative defense or a matter of jurisdiction, there is presented a question as to the remedy of a defendant who has been convicted under the statute but who later develops information which indicates that the conviction would not have been had if the evidence had been available. For example, an interesting case involved the possession of four tablets of seconal in an unmarked container which at the time of the trial were not explained so as to bring the defendant within the exception contained in the statute. Following the trial, however, there was a Motion for New Trial based on evidence which showed that the tablets had been obtained by a valid prescription from a physician. The trial court denied the Motion for New Trial on grounds that this evidence could have been procured at trial, but

Attention is called to the fact that FLA.STAT. § 893.13(1)(f) now provides that possession or delivery without consideration of less than 20 grams is a misdemeanor. Pope was decided when the statute required but 5 grams.

⁷³ See Carr v. State, 267 So. 2d 684 (Fla. 2d DCA 1972).

^{73a} See also Note 72.

⁷⁴ Collins v. State, 271 So. 2d 156 (Fla. 4th DCA 1972).

^{74a} See generally Purifoy v. State, 359 So. 2d 446 (Fla. 1978); Patterson v. State, 313 So. 2d 712 (Fla. 1975).

§ 6.3[D]

DRUG OFFENSES

6–223

the Appellate Court reversed with the concession that “it is better to bend the rule of procedure than use the rule to convict an innocent person.”⁷⁵

The offense of possession has been utilized by the state as the foundation felony in an application of the felony murder rule. This combination presents peculiar problems for defense which may be best illustrated by the case of *Clayton v. State*.⁷⁶ In that instance the defendant voluntarily ingested an hallucinogenic drug and as a result stabbed an innocent victim to death. At the trial the defense counsel stipulated to the fact that defendant was using some form of hallucinogen. Apparently this was the purpose of explaining defendant’s temporary state of insanity which was to be the major defense. The court accepted the stipulation and then determined that in order to ingest the drug the defendant had to have possessed it and such possession constituted a felony. Since the stabbing occurred as a result of this felony, it was determined to fall within FLA. STAT. § 784.04 which is the third degree murder provision. Unfortunately for the defendant in this case, the jury found against him on the issue of insanity leaving his stipulated felony to found a felony murder conviction. Another practice pointer concerns the defense of entrapment as related to the possession charge. Where the defendant’s possession is related only to the sale and only involves the contraband which is subject of the sale and the sale is held to be induced by the state so as to give rise to the defense of entrapment, the same defense will also be valid as to the possession charge, at least where independent intent to possess cannot be established.⁷⁷

Where an information charged an individual with the following, it stated but one offense and sufficiently placed him on notice of the charged offense:^{77a}

to wit: four (4) aluminum foil packets containing a white powder mixture of Heroin, Cocaine, or a combination thereof, in violation of Section 893.13(1)(e), Florida Statutes.

Similarly, in *State v. Mena*,^{77b} the court held that where the information tracked the language of both the cocaine trafficking statute and the conspiracy statute, it was sufficient.

⁷⁵ Chavez v. State, 215 So. 2d 750 (Fla. 2d DCA 1968).

⁷⁶ Clayton v. State, 272 So. 2d 860 (Fla. 3d DCA 1973).

⁷⁷ Rogers v. State, 277 So. 2d 838 (Fla. 3d DCA 1973). See also Ch. 1, Arrest, § VII, dealing with entrapment.

^{77a} West v. State, 456 So. 2d 946 (Fla. 1st DCA 1984).

^{77b} State v. Mena, 471 So. 2d 1297,1301 (Fla. 3d DCA 1985).

6-224 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[E]

It is also important to realize that any controlled substance, if available, must be introduced into evidence in a possession case.^{77c}

E. Attempted Possession.

It is clear from the case law that attempting to possess drugs is a criminal offense under the laws of Florida.⁷⁸ In *Dearing v. State*,^{78A} the Third District Court of Appeal held that an attempt to fly marijuana into the United States violates 21 U.S.C. sections 952(a), and 963, even where it occurred entirely outside United States boundaries.

However, in *Di Sangro v. State*,^{78b} the court found that no attempted possession existed since the defendant had no dominion and control over the contraband in question. There the evidence showed that the defendant was present on a boat during a sale of valium; that he helped count the money; he was present at a restaurant during further planning for additional sales. The court held that such a serious suspension of possession still did not constitute proof beyond a reasonable doubt. The defendant was, however, convicted of racketeering.

On the other hand, in *Morton v. State*,^{78c} the Fifth District Court of Appeals held that an admission by the defendant that he came to the motel room, where the cocaine was located, in order to purchase cocaine was sufficient to allow a conviction for attempted possession.

Attempted manufacturing marijuana is also a separate lesser offense of manufacturing it.^{78d}

^{77c} *Trinidad v. State*, 615 So. 2d 806 (Fla. 3d DCA 1993).

⁷⁸ See *Silvestri v. State*, 332 So. 2d 351 (Fla. 4th DCA 1976); See also *Walker v. State*, 389 So. 2d 312 (Fla. 2d DCA 1980); *Lightfoot v. State*, 331 So. 2d 388 (Fla. 2d DCA 1976); *Nichols v. State*, 248 So. 2d 199 (Fla. 4th DCA 1976); *Tibbetts v. State*, 583 So. 2d 809 (Fla. 4th DCA 1991) (the substance the defendant attempted to possess need not be an illegal drug)

In *Vinyard v. State*, 586 So. 2d 1301, 1302 (Fla. 2d DCA 1991) (since FLA. STAT. § 893.13(1)(a) does not contemplate the crime of attempted possession, a conviction for such offense must be obtained under FLA. STAT. § 777.04(1).

^{78A} *Dearing v. State*, 388 So. 2d 296, 298 (Fla. 3d DCA 1980), at footnote 1.

^{78b} *Di Sangro v. State*, 422 So. 2d 14 (Fla. 4th DCA 1982).

^{78c} *Morton v. State*, 496 So. 2d 999 (Fla. 5th DCA 1986).

^{78d} *Peak v. State*, 443 So. 2d 359 (Fla. 1st DCA 1983).

For a detailed explanation of the broad law of attempt, see Davidson, *Florida Criminal Sentencing Law*, Chapter Six, section 6.0222 (D & S Publishers).⁷⁹

F. Obtaining A Controlled Substance By Misrepresentation, Fraud, Forgery, Deception or Subterfuge.

FLA. STAT. § 893.13 (7)(a) provides:

(7)(a) It is unlawful for any person:

1. To distribute or dispense a controlled substance in violation of this chapter.

2. To refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter.

3. To refuse an entry into any premises for any inspection or to refuse to allow any inspection authorized by this chapter.

4. To distribute a controlled substance named or described in s. 893.03(1) or (2) except pursuant to an order form as required by s. 893.06.

5. To keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft or other structure or place which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

6. To use to his or her own personal advantage, or to reveal any information obtained in enforcement of this chapter except in prosecution or administrative hearing for a violation of this chapter.

7. To withhold information from a practitioner from whom the person seeks to obtain a controlled substance or a prescription for a controlled substance that the person has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the last 30 days.

8. To possess a prescription form which has not been completed and signed by the practitioner whose name appears printed thereon, unless the person is that practitioner, is an agent or employee of that practitioner, is a pharmacist, or is a supplier of prescription forms who is authorized by that practitioner to possess those forms.

⁷⁹ See also below § XI.

6-226 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.3[G]

9. To acquire or obtain, or attempt to acquire or obtain, possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.

10. To affix any false or forged label to a package or receptacle containing a controlled substance.

11. To furnish false or fraudulent material information in, or omit any material information from, any report or other document required to be kept or filed under this chapter or any record required to be kept by this chapter.

(b) Any person who violates the provisions of subparagraphs (a)1.-8. commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083; except that, upon a second or subsequent violation, the person commits a felony of the third degree, punishable as provided in s. 775.082, or s. 775.084.

(c) Any person who violates the provisions of subparagraphs (a)9.-11, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

In *State v. Coker*,^{79a} the appellate court held that where the accused lied to a pharmacist in order to refill a prescription, this constituted an attempt to obtain the drug by fraud or misrepresentation. Consequently, this was a violation of the above statute.

G. Possess With Intent To Sell, Purchase, Manufacture Or Deliver

FLA. STAT. § 893.13(1)(a)^{79b} provides that it is unlawful to possess with the intent to sell, purchase, manufacture, or deliver^{79c} any of the drugs listed therein.

^{79a} *State v. Coker*, 452 So. 2d 1135 (Fla. 2d DCA 1984). See more recently, *Hudson v. State*, 745 So.2d 997 (2nd DCA 1999). Compare *Mariano v. State*, 615 So.2d 264 (Fla. 4th DCA 1993) (the state failed to prove that the defendant attempted to acquire drugs by attorning a forged prescription).

^{79b} See also *Keegan v. State*, 553 So. 2d 797 (Fla. 5th DCA 1989) and *Raulerson v. State*, 551 So. 2d 1266 (Fla. 1st DCA 1989), where the constitutionality of this statute has been upheld.

^{79c} See also *Woods v. State*, 596 So. 2d 156 (Fla. 4th DCA 1992) for a case in which a conviction was upheld.

H. Defenses

In the interesting decision in *Jenks v. State*,^{79d} the First District Court of Appeals held that since FLA. STAT. § 893.03 does not specifically preclude the defense of medical necessity, the defendant was not guilty of the offense of possession of marijuana since he demonstrated that it was medically necessary to treat his AIDS induced nausea. The case also cites several other cases dealing with treatment for glaucoma. Consequently, whenever a defendant can demonstrate a medical necessity for the use of a drug, he may use it with impunity absent specific statutory language to the contrary.

§ 6.4. DELIVERY (SALE)^{79e}

A. Nature Of Delivery

The old Florida statute used the term “sale” which, according to the statute, included barter, exchange, gift or offer thereof. The term “sale” has also been held to include the term “delivery.”⁸⁰ One court even held that the mere offer of sale, without any indication of acceptance, constituted a sale for purposes of the statute.⁸¹ Therefore, it seemed a “purchase” was not an essential element of the offense of unlawful sale. However, the Supreme Court of Florida in the case of *Patterson v. State*⁸² held that there must, in fact, be a sale. Here the court stated that there could be no conviction for a sale of drugs since no consideration was paid.

In reading the *Patterson* decision it seems as though the Supreme Court is even saying that the allegation of selling drugs is insufficient unless the state alleges the sale was for consideration. This seems ridiculous when

^{79d} *Jenks v. State*, 582 So. 2d 676, 679–680 (Fla. 1st DCA 1991).

^{79e} See also Trafficking cases contained below in § VII.

⁸⁰ *Carr v. State*, 267 So. 2d 684 (Fla. 2d DCA 1972). See also *Weinstein v. State*, 348 So. 2d 1194 (Fla. 3d DCA 1977) where the court held that sale or delivery under FLA. STAT. § 893.13 was only one offense which may be proved in different ways.

⁸¹ *Delgado v. State*, 229 So. 2d 651 (Fla. 3d DCA 1969). See also *Betancourt v. State*, 228 So. 2d 124 (Fla. 3d DCA 1969); *Shaheen v. State*, 228 So. 2d 444 (Fla. 2d DCA 1969) where the court held that an actual delivery of marijuana was unnecessary for a sale; FLA. STAT. § 893.02(4), which includes attempted transfers.

⁸² *Patterson v. State*, 313 So. 2d 712 (Fla. 1975); *limitedState v. Stewart*, 374 So. 2d 1381 (Fla. 1979). Compare *Boatwright v. State*, 566 So. 2d 75 (Fla. 1st DCA 1990) (trading marijuana for cocaine was a sale and purchase).

6-228 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.4[A]

one considers that consideration is a part of every “sale.” Alleging both a sale and that it was for consideration, then, is redundant.

In dealing with this problem the Fourth District Court of Appeal held in the case of *Jackson v. State*⁸³ that it is not necessary to allege that a sale was for consideration. The court distinguished the *Patterson* case saying that it contained a factual stipulation that there was no consideration given for the marijuana. Apparently this stipulation negated the possibility of a sale.

Whether consideration is necessary for a conviction for the sale of drugs should no longer be a problem since under the new statute the term “sale” is substantially abandoned in favor of the term “deliver” or “delivery.”^{83a} This is a much broader term and according to the statute, “means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.”⁸⁴ The fact that “sale” is included within the term “deliver” seems to be verified by reference to FLA. STAT. § 893.13 entitled Prohibited Acts; Penalties, where under Section (1)(a) “sale” is in *pari materia* with the manufacture, delivery or possession of a controlled substance. Accordingly, one court has held that to “sell . . . or deliver. . .” under FLA. STAT. § 893.13 is but one offense which may be proved in different ways.⁸⁵ Therefore, if drugs are transferred without consideration it would still, constitute a delivery under the statute.

In *Newman v. State*,^{85a} the court even found that delivery took place notwithstanding the facts that the drugs had not been physically given to the undercover officer involved and that no money had been paid. The court held that the drugs had been sampled and the drug deal had been completed since the drugs were on the table in front of the officer.

⁸³ *Jackson v. State*, 365 So. 2d 414 (Fla. 4th DCA 1979). *See also* *State v. Stewart*, 374 So. 2d 1381 (Fla. 1979).

^{83a} *Cf.* *State v. Ryan*, 413 So. 2d 411 (Fla. 4th DCA 1982), dealing with trafficking, where the court held that under a charge of trafficking in cocaine, it would be a defense if the defendant believed she was trafficking in marijuana.

⁸⁴ *See* FLA. STAT. § 893.02(5). No decision under the new law. *But see* *State v. Stewart*, 374 So. 2d 1381 (Fla. 1979). *See also* *Milazzo v. State*, 377 So. 2d 1161 (Fla. 1979); *Douglas v. State*, 627 So. 2d 1190 (Fla. 1st DCA 1993) (the defendant aided in the delivery in question).

⁸⁵ *Weinstein v. State*, 348 So. 2d 1194 (Fla. 3d DCA 1977).

^{85a} *Newman v. State*, 522 So. 2d 71 (Fla. 4th DCA 1988).

However, delivery *without consideration* of twenty grams or less of marijuana only constitutes a first degree misdemeanor pursuant to FLA. STAT. § 893.13(6)(b). But in *Johnson v. State*,^{85b} the Supreme Court of Florida held that where a mother passes cocaine through an umbilical cord after her child's birth, no criminal delivery occurs. The legislative history indicated that this was not the intent of the statute.

It also should be noted that if a physician prescribes a drug without the requisite good faith or other than in the course of his professional practice, this constitutes the offense of delivery as defined in § 893.02(5), of the Florida Statutes.⁸⁶

Under the newly revised statutory section, FLA.STAT. § 893.13 (1)(a) there need only be “intent” to sell, manufacture, or deliver. This changed the former, more stringent, “specific intent” requirement.^{86a}

Under this intent requirement one court has held that mere possession of a large quantity of drugs does not of itself show an intent to sell.⁸⁷ However, this same First District Court of Appeal had previously seemed to imply that drugs may be possessed in such a quantity as to require such a conclusion of an intent to sell same.⁸⁸

But whereas a specific intent is required to possess drugs with the intent to sell them, it appears that no specific intent is required in a connection for mere sale or delivery. In *Grimmage v. State*,^{88a} the court held that the failure of the trial court to give a jury instruction on attempt was proper since “[W]here a Statute denounces the doing of an act as criminal without specifically requiring criminal intent, it is not necessary for the State to

^{85b} *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992).

⁸⁶ *Cilento v. State*, 377 So. 2d 663, 666 (Fla. 1979). *See also* *Forlaw v. State*, 456 So. 2d 432, 434 (Fla. 1984); *State v. Vinson*, 320 So. 2d 50 (Fla. 2d DCA 1975) (construing § 893.05(1), Fla. Stat).

^{86a} FLA. STAT. § 893.13 (1)(a). Under prior law, *see* *Sipp v. State*, 442 So. 2d 392 (Fla. 5th DCA 1983). *See also* *Reinersman v. State*, 382 So. 2d 325, 326 (Fla. 2d DCA 1980), where the Second District Court of Appeal correctly pointed out that the mere possession of more than 100 lbs. of marijuana does not constitute a second degree felony. Possession is a third degree felony unless the defendant had a specific intent to sell or deliver it.

⁸⁷ *Aylin v. State*, 362 So. 2d 435 (Fla. 1st DCA 1978), *construing*, FLA STAT § 893.13(1)(a)(2). *See also* *Norman v. State*, 362 So. 2d 444 (Fla. 1st DCA 1978) where drugs were found on land owned by another but rented (occupied) by defendant.

⁸⁸ *Howell v. State*, 337 So. 2d 823 (Fla. 1st DCA 1976).

^{88a} *Grimmage v. State*, 427 So. 2d 338, 339 (Fla. 1st DCA 1983).

6-230 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.4[A]

prove that the commission of such act was accompanied by criminal intent.” (citations omitted)

It is also important to realize that a sale may be consummated without the seller actually possessing the drugs. Consequently, proof of possession is not necessary to establish a sale.^{88b}

Another element of the definition of “delivery” is the statement “. . .whether or not there is an agency relationship.”⁸⁹ Whether this phrase is meaningless surplusage remains to be seen from subsequent cases, but a preliminary analysis would seem to indicate that in many instances it would have no legal efficacy. If an agency relationship is assumed in the delivery of a controlled substance and the agent is an innocent agent, the non-innocent principal would be responsible for his act of delivery in any event and the interposition of the agency relationship could not be expected to relieve him of responsibility under the statute. If the agent is not an innocent agent then both the agent and the principal may be individually responsible under the statute, assuming both possessed the requisite intent and knowledge, since the act of the agent is also the act of the principal. This might be held on the ground that the agent and principal are in fact co-conspirators and therefore, in effect, become joint principals.

On the other hand, however, where the agency relationship cannot be demonstrated, the legislature is not free to establish responsibility under the statute unless there is some legal basis for doing so. If there is no agency relationship, then the responsibility must be predicated on some other basis.

What was probably intended by the legislature in the use of this terminology is that the mere fact that one has utilized the agency mechanism for the accomplishment of the delivery does not remove the responsibility of the principal under the statute. For example, one court found a “sale” where the defendant, after negotiating the price, directed the purchaser to leave the premises and conclude the purchase outside the premises with the seller’s agent. The agent of the defendant came out with the contraband, received the money and disappeared back into the premises from which the purchasers had just come.⁹⁰ A careful examination of this case, however,

^{88b} *Priestly v. State*, 450 So. 2d 289, 291 (Fla. 4th DCA 1984). *See also* *St. Clair v. State*, 575 So. 2d 243 (Fla. 2d DCA 1991); *State v. Howze*, 458 So. 2d 318 (Fla. 3d DCA 1984), dealing with abetting a sale. *Compare* *Garces v. State*, 485 So. 2d 847 (Fla. 3d DCA 1986) (no trafficking or possession offenses by the attempted purchaser existed where the arrest was effected prior to the actual delivery).

⁸⁹ FLA. STAT. § 893.02(5).

⁹⁰ *Harris v. State*, 229 So. 2d 670 (Fla. 3d DCA 1969).

§ 6.4[A]

DRUG OFFENSES

6-231

indicates that the court was probably not applying the doctrine of respondeat superior in the criminal context but that rather, the defendant was being held for his own act and not the act of the agent. The agent was only an instrumentality.

The law involving criminal responsibility based on the respondeat superior concept is somewhat technical. In civil litigation there is little difficulty in applying this doctrine, especially in those tortious acts which do not require any attending mental element. Therefore, since it is only the “act” that is the concern of civil law, it is not difficult to transfer the act of the agent to the principal and thereby achieve the resultant liability.⁹¹ But in the criminal context there is difficulty in applying the same rationale in order to achieve responsibility, chiefly by virtue of the required presence in most criminal violations of a *mens rea* element.⁹² Generally, therefore, while the courts have found little difficulty in applying the doctrine of respondeat superior to offenses which require no *mens rea*, when it comes to a transfer of the *mens rea* of the agent to the principal there is a disability in the law and in reason since one man’s state of mind cannot fairly be transferred to another. This is particularly true in a specific intent violation such as occurs in the instant statute. Therefore, the mere fact that a delivery has occurred through the imposition of an agency relationship will not be sufficient to establish responsibility under the statute, regardless of the legislative provision, unless factually it may be determined that the principal whose responsibility is sought, *himself* meets all the elements of the statute including the requisite *mens rea*.

Also, of course, if one aids and abets another in selling or delivering contraband he may be convicted as a principal.⁹³ This is true even though defendant merely arranges the meeting between buyer and seller, and even where defendant receives no compensation.⁹⁴ To convict an accused as an aider and abettor the state must prove not just that a delivery took place

⁹¹ See *Commonwealth v. Koczvara*, 155 A. 2d 825 (Pa. 1959) where the doctrine of vicarious liability was limited to a minimal punishment context.

⁹² See *Lovelace v. State*, 2 So. 2d 796 (Miss. 1941) for an example of this.

⁹³ *State v. Dent*, 322 So. 2d 543 (Fla. 1975); *State v. Combs*, 330 So. 2d 560 (Fla. 1st DCA 1976); *State v. Hubbard*, 328 So. 2d 465 (Fla. 2d DCA 1976); *Smith v. State*, 320 So. 2d 420 (Fla. 2d DCA 1975). Compare *Runge v. State*, 368 So. 2d 366 (Fla. 2d DCA 1979).

⁹⁴ *State v. Dent*, 322 So.2d 543 (Fla. 1975); *Stephenson v. State*, 371 So. 2d 554 (Fla. 2d DCA 1979). See also *Williams v. State*, 376 So. 2d 420 (Fla. 3d DCA 1979) dealing with conspiracy.

6-232 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.4[B]

and that defendant aided in its commission, but also that he had an intent to participate in the crime.⁹⁵

B. Separate Offenses

A great deal of confusion is caused by the question of whether a defendant may be convicted and sentenced for both possession and sale of the same drugs. There is no question but that the same act may at times constitute separate offenses and justify findings of guilt on two or more counts from which separate sentences may be imposed.⁹⁶ At least this principle is valid where the proof required for each offense is different.⁹⁷ But it has been held that where the two offenses defined in the statutes require the same proof or are identical, there can be only one punishment.⁹⁸

However, in *State v. McCloud*,⁹⁹ the Supreme Court of Florida held that possession is no longer a lesser included offense of sale of drugs. Since a sale may be consummated without possession, the court reasoned that possession is not included therein *even where the accused actually possessed only the amount of drugs sold*. However, see *State v. Connelly*, in which the Florida Supreme Court held that the double jeopardy clause did not prohibit the defendant from being convicted of both introducing or possessing contraband upon the grounds of a county detention facility and possession of cannabis; prosecution in respect to the first count was solely for the act of introduction, and prosecution on the second count was for the act of simple possession.¹⁰⁰

For a more thorough discussion of this topic, see *Florida Criminal Sentencing Law*, Chapter 5 (Butterworth Legal Publishers).¹⁰¹⁻¹¹⁷

C. Attempted Delivery (Sale)

FLA. STAT. § 893.02(5) defines delivery as an “attempted transfer.” Accordingly, there is no provision for an attempt violation in the penalty

⁹⁵ *Beasley v. State*, 360 So. 2d 1275 (Fla. 4th DCA 1978). See also *Daudt v. State*, 368 So. 2d 52 (Fla. 2d DCA 1979). Above note 93.

⁹⁶ *Evans v. U.S.*, 232 F. 2d 379 (D.C. Cir. 1956).

⁹⁷ *Guarro v. U.S.*, 237 F. 2d 578 (D.C. Cir. 1956); *McPhee v. State*, 254 So. 2d 406 (Fla. 1st DCA 1971); *State v. Smith*, 240 So. 2d 807 (Fla. 1970).

⁹⁸ *Kendrick v. U.S.*, 238 F. 2d 34 (D.C. Cir. 1956).

⁹⁹ *State v. McCloud*, 577 So. 2d 939 (Fla. 1991).

¹⁰⁰ *State v. Connelly*, 748 So.2d 248 (Fla. 1999).

¹⁰¹⁻¹¹⁷ [Reserved for Future Material]

provision of the statute.¹¹⁸ Therefore, if a defendant is charged with the delivery of a substance prohibited by this statute, he or she generally is not entitled to have the jury instructed on attempt, since it is not a lesser included offense of delivery.¹¹⁹

D. Selling Substituted Or Counterfeit Substances^{119A}

Where an individual offers or agrees to sell to another any controlled substance named in FLA. STAT. § 893.03, and then sells another substance in lieu of the controlled substance, this constitutes a criminal offense under FLA. STAT. § 817.563. If the substance agreed upon is listed in FLA. STAT. § 893.03(1), (2), (3) or (4), the offense is a third-degree felony. If the substance agreed upon is listed in FLA. STAT. § 893.03(5), the offense is a second degree misdemeanor.

In *State v. Bussey*,¹²⁰ the Supreme Court of Florida held that FLA. STAT. § 817.563 requires only a *general* intent. Also, it is not unconstitutionally vague, nor is it a fraud statute. In upholding the validity of FLA. STAT. § 817.563 from another constitutional attack in the subsequent case of *Houser v. State*,¹²¹ the court pointed out that it does not lack a reasonable relation to a legitimate state objective, notwithstanding that no controlled substance is involved.

However, where a suspect was found with wax in his pocket, and where he had done nothing to indicate that the wax was crack cocaine, it did not constitute a counterfeit substance.^{121a}

¹¹⁸ FLA. STAT. § 893.13. *See also* *Dearing v. State*, 388 So. 2d 296, 298 fn. 1 (Fla. 3d DCA 1980) where the court held that it also violates federal law to attempt to bring marijuana into the United States, notwithstanding the fact that all criminal acts occurred outside the country's boundaries. *Compare* *Carruthers v. State*, 636 So. 2d 853, 855 (Fla. 1st DCA 1994)(this is not true for an attempt to violate FLA. STAT. § 817.563).

¹¹⁹ *See also* *Milazzo v. State*, 377 So. 2d 1161 (Fla. 1979). *Cf.* *King v. State*, 339 So. 2d 172 (Fla. 1976), FLA. STAT. § 777.04. *Compare* *State v. Cohen*, 409 So. 2d 64 (Fla. 1st DCA 1982)(the sale of an uncontrolled substance as a controlled substance constitutes attempted sale of the controlled substance); and *above* note 78. *See also* *below* § D.

^{119A} *See also* FLA. STAT. § 817.564, dealing with imitation controlled substances.

¹²⁰ *State v. Bussey*, 463 So. 2d 1141 (Fla. 1985). *Compare* *State v. Jones*, 565 So. 2d 788 Fla. 1st DCA 1990) (part of FLA. STAT. § 817.564, which defines a substance as one other than those controlled by Ch. 893, but "which is subject to abuse" . . . is unconstitutionally ambiguous).

¹²¹ *Houser v. State*, 477 So. 2d 548 (Fla. 1985).

^{121a} *Drain v. State*, 601 So. 2d 256 (Fla. 5th DCA 1992).

6-234 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.4[E]

Unlike the mere “delivery” requirement explained *above* in section IV, A, however, where a substituted substance is involved there must be an actual “sale.”^{121a1} Consequently, where a defendant was arrested after delivering alleged cocaine to a prospective purchaser, but before any money changed hands, no violation of FLA. STAT. § 817.563 occurred.^{121a2}

FLA. STAT. § 831.31 also provides that it is unlawful for any person to sell, manufacture, or deliver, or to possess with intent to sell, manufacture, or deliver, a counterfeit controlled substance.^{121a3} This statute has been held constitutional in *State v. Hayes*.^{121b}

E. Delivery by a Person 18 or Older to a Person Under 18; or Using a Person Under 18 as an Agent^{121c}

Section 893.13(4) provides as follows:

(4) Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such person to assist in avoiding detection or apprehension for a violation of this chapter. Any person who violates this provision with respect to:

(a). A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), or (2)(b), or (2)(c)4., commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b). A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6. (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

^{121a1} *But see* FLA. STAT. § 831.31.

^{121a2} *Mitchell v. State*, 488 So. 2d 632 (Fla. 4th DCA 1986).

^{121a3} *Compare* *Durr v. State*, 583 So. 2d 424 (Fla. 1st DCA 1991) (since the 12 rocks of what appeared to be cocaine were in a clear plastic bag, they were not falsely identified by their container, and so no violation of FLA. STAT. § 831.31 occurred).

^{121b} *State v. Hayes*, 446 So. 2d 1185 (Fla. 4th DCA 1984).

^{121c} *See also* FLA. STAT. § 893.147(3).

§ 6.4[F]

DRUG OFFENSES

6–235

Imposition of sentence shall not be suspended or deferred, nor shall the person so convicted be placed on probation.

In *State v. Bragg*,^{121d} the court held that for the purposes of the above statute, a person is “over the age of 18 years” where he has reached his eighteenth birthday. However, the 1985 statute construed in *Bragg* did not provide that the offender be “18 years of age or older,” but that he be “over the age of 18 years.” The current statute renders this question moot.

In a case of first impression, the Fifth District Court of Appeal has even held that where a mother ingests a drug, and where it is passed on to her child at birth, this violates the statute in question. In *Johnson v. State*,^{121e} the court held that where cocaine passed through the umbilical cord in the short time *after* the baby was born, but before the cord was cut, this constituted delivery to a person under eighteen.

F. Selling, Purchasing, Manufacturing, Delivering, or Possessing for Such Purposes, Within 1,000 Feet of a School

Section 893.13(1)(c)^{121f} provides as follows:

(c) Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or possess with the intent to sell, manufacture, or deliver a controlled substance in, on, or within 1,000 feet of the real property comprising a child care facility as defined in s. 402.302, or a public or private elementary, middle, or secondary school between the hours of 6 a.m. and 12 a.m. Any person who violates this paragraph with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b) or (2)(c)4., commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The defendant must be sentenced to a minimum term of imprisonment of 3 calendar years unless the offense was committed within 1,000 feet of the real property comprising a child care facility as defined in s. 402.302.

^{121d} *State v. Bragg*, 516 So. 2d 78 (Fla. 5th DCA 1987).

^{121e} *Johnson v. State*, 578 So. 2d 419 (Fla. 5th DCA 1991).

^{121f} *See also* *Jennings v. State*, 682 So. 2d 144 (Fla. 1996); and *Burch v. State*, 558 So. 2d 1 (Fla. 1990) (this statute is not unconstitutional). *Compare* *Stevens v. State*, 642 So. 2d 828–830 (Fla. 2d DCA 1994)(the statute that prohibits selling drugs near a public housing facility is unconstitutionally vague).

6-236 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.4[F]

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)4., (2)(c)5., (2)(c)6., (2)(c)7., (3), or (4) commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084.

3. Any other controlled substance, except as lawfully sold, manufactured, or delivered, must be sentenced to pay a \$500 fine and to serve 100 hours of public service in addition to any other penalty prescribed by law.

This paragraph does not apply to a child care facility unless the owner or operator of the facility posts a sign that is not less than 2 square feet in size with a word legend identifying the facility as a licensed child care facility and that is posted on the property of the child care facility in a conspicuous place where the sign is reasonably visible to the public.

In *State v. Roland*,^{121g} it was held that that statute did not apply to kindergartens or preschools. Consequently, for offenses that occur near those schools the penalties mentioned above do not apply. However, the 2000 Legislature added language making it applicable with notice.

It is also important to realize that the one thousand foot distance from a school is to be measured as the crow flies.^{121h} Local idiosyncrasies of pedestrian or automobile travel are irrelevant in measuring such distance. Furthermore, expert testimony as to school boundaries or distance is not required,¹²¹ⁱ and a measuring device used for such purposes need not be previously calibrated or otherwise independently tested for accuracy.^{121j} However, the defense may, of course, challenge such testimony or evidence with conflicting evidence, and argue this to the jury.^{121k}

Notwithstanding the fact that this statute provides for a three-year minimum mandatory sentence, the Supreme Court of Florida has held¹²²

^{121g} *State v. Roland*, 577 So. 2d 680, 681 (Fla. 4th DCA 1991); *see also* *State v. Lee*, 583 So. 2d 1055 (Fla. 4th DCA 1991) (an exceptional school for retarded and handicapped students was not a school for the purposes of this statute). *Compare* *State v. Edwards*, 581 So. 2d 232 (Fla. 4th DCA 1991) (the statute applies to small parochial schools).

^{121h} *Howard v. State*, 591 So. 2d 1067, 1068 (Fla. 4th DCA 1991).

¹²¹ⁱ *Lyon v. State*, 591 So. 2d 1107 (Fla. 4th DCA 1992).

^{121j} *State v. Alvarino*, 585 So. 2d 1094 (Fla. 3d DCA 1991).

^{121k} *See generally* *Lyon v. State*, 591 So. 2d 1107 (Fla. 4th DCA 1992).

¹²² *Scates v. State*, 603 So. 2d 504, 506 (Fla. 1992).

§ 6.5

DRUG OFFENSES

6-237

that trial judges may refer a defendant convicted under it to a drug abuse program pursuant to FLA. STAT. § 397.12 instead. The court disapproved of cases holding otherwise.

§ 6.5. PARAPHERNALIA OFFENSES^{122a}

Section 893.147 provides that it is a criminal offense to use,^{122b} possess with intent to use,^{122c} manufacture,^{122d} deliver,^{122e} transport^{122f} or advertise the sale of^{122g} drug paraphernalia. The term “drug paraphernalia” is statutorily defined:

The term “drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, transporting, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter or s. 877.111. Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture. The term includes, but is not limited to:

- (1) Kits used, intended for use, or designed for use in the planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.
- (2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.
- (3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

^{122a} See also Eakin, Florida’s New Drug Paraphernalia Law: An Overview, 62 FLA. B.J. (1983).

^{122b} FLA. STAT. § 893.147(1).

^{122c} FLA. STAT. § 893.147(1).

^{122d} FLA. STAT. § 893.147(2).

^{122e} FLA. STAT. § 893.147(2). Or possess with intent to deliver. See also FLA. STAT. § 893.147(3), which provides that where such delivery is to a minor the offense is a second-degree felony.

^{122f} FLA. STAT. § 893.147(4)

^{122g} FLA. STAT. § 893.147(5).

6-238 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.5

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

§ 6.5

DRUG OFFENSES

6-239

- (g) Chamber pipes.
- (h) Carburetor pipes.
- (i) Electric pipes.
- (j) Air-driven pipes.
- (k) Chillums.
- (l) Bongs.
- (m) Ice pipes or chillers.
- (n) A cartridge or canister, which means a small metal device used to contain nitrous oxide.
- (o) A charger, sometimes referred to as a “cracker,” which means a small metal or plastic device that contains an interior pin that may be used to expel nitrous oxide from a cartridge or container.
- (p) A charging bottle, which means a device that may be used to expel nitrous oxide from a cartridge or canister.
- (q) A whip-it, which means a device that may be used to expel nitrous oxide.
- (r) A tank.
- (s) A balloon.
- (t) A hose or tube.
- (u) A 2-liter-type soda bottle.
- (v) Duct tape.^{122h}

It is important to note, however, that as of June 25, 1981, the mere possession of drug paraphernalia is *no longer a criminal offense*.¹²²ⁱ Section 893.147(1) was amended to preclude only the use of the possession with intent to use paraphernalia for drug purposes. Consequently the use or its manufacture or sale for decoration or otherwise innocent purposes is not unlawful.

In the interesting decision in *Baldwin v. State*,^{122j} the court held that the statute does not require that a person unequivocally know that the paraphernalia will be used for an illicit purpose; rather, the state must prove

^{122h} FLA. STAT. § 893.145.

¹²²ⁱ See Laws of Florida Ch. 81-149, amending FLA. STAT. § 893.147(1).

^{122j} *Baldwin v. State*, 498 So. 2d 1385 (Fla. 5th DCA 1986).

that the defendant knew or *reasonably should have known* that it would be used for such a purpose.

In another interesting decision, *Dydek v. State*,^{122k} the defendant was charged with possessing or using a cigarette case for drug purposes. Since the case could be used to “contain or conceal” contraband, the charging document was upheld as sufficient, and would be so even under the new statute. However, since no evidence was adduced to the effect that the case was to be used for containing or concealing contraband, the defendant’s conviction was reversed. The fact that it contained other instruments that were themselves paraphernalia did not render the case paraphernalia also.

Similarly, in *Campbell v. State*,^{122kk} the state did not prove that scales found in a bedroom closet were used in violation of the law. Consequently, they were not drug paraphernalia.

It is also important that the state prove that any item in question was actually “possessed.” In determining this, *see above* section III.^{122l}

Using, possessing with intent to use,^{122m} or advertising the sale of drug paraphernalia, constitutes a first-degree misdemeanor.¹²²ⁿ The manufacture or delivery of paraphernalia constitutes a third-degree felony.^{122o} Transportation constitutes a felony of the third degree.^{122o1} And where such delivery is by an adult to a minor, the offense becomes a second-degree felony.^{122p}

^{122k} *Dydek v. State*, 400 So. 2d 1255 (Fla. 2d DCA 1981); *see also* *Nixon v. State*, 680 So. 2d 506 (Fla. 1st DCA 1996) (homemade crack pipes found in suspect’s boot and pocket were not unlawful).

^{122kk} *Campbell v. State*, 459 So. 2d 357 (Fla. 2d DCA 1984); *see also* *Gordon v. State*, 639 So. 2d 188 (Fla. 4th DCA 1994) (rolling papers were not paraphernalia where no marijuana was present); *Frazier v. State*, 608 So. 2d 530 (Fla. 5th DCA 1992) (a triple beam scale of the type generally used to weigh controlled substances was not drug paraphernalia per se); *Williams v. State*, 529 So. 2d 345, 347-348 (Fla. 1st DCA 1988).

^{122l} *See also* *Morton v. State*, 496 So. 2d 999 (Fla. 5th DCA 1986) (no possession existed where the defendant came to a motel room to purchase drugs, but never possessed either the drugs or paraphernalia in question); *Watts v. State*, 569 So. 2d 889 (Fla. 1st DCA 1990) (the presence of the defendant’s fingerprints on a beer can converted into a cocaine smoking device was insufficient for a conviction-the prints might have been placed there prior to the conversion).

^{122m} FLA. STAT. § 893.147(1).

¹²²ⁿ FLA. STAT. § 893.147(5).

^{122o} FLA. STAT. § 893.147(2).

^{122o1} FLA. STAT. § 893.147(4).

^{122p} FLA. STAT. § 893.147(3).

§ 6.6[A]

DRUG OFFENSES

6–241

For the penalties commensurate with the various offenses, *see below* section X.

§ 6.6. PROOF OF SUBSTANCE

A. Burden of Proof

Since the state is the alleging party, it has the burden of proving that a particular substance in question is in fact a narcotic.¹²³ This is not the same, however, as requiring the state to prove that marijuana is a narcotic. In one case where the defendant alleged that he was denied due process because FLA. STAT. § 398 (now repealed) improperly listed marijuana as a narcotic and because the state did not prove that marijuana was a narcotic, the defendant's contention was overruled.¹²⁴ While the state does have the burden of proving that the particular material is the substance it has charged, the burden of proving an exception or exemption to this rests on the defendant.¹²⁵ However, the Supreme Court of Florida has also held that the burden of proving an "exclusion" from FLA. STAT. § 893 does not rest on the defendant¹²⁶ (emphasis added). The difference, the court explained, is that in the former instance the defendant is in effect admitting possession of a prohibited substance, but claiming this possession is an exemption or exception to the statutory prohibition. On the other hand, exclusions from the statute are nonprohibited, and so the defendant need not admit to possession of any prohibited substance.

In the instant case, the Supreme Court held that mature marijuana stems were included within the statutory exclusion of mature stalks found in FLA. STAT. § 893.02(2).^{126a} Thus, the State had the burden of proving that any

¹²³ *Zide v. State*, 212 So. 2d 788 (Fla. 3d DCA 1968); *Longshaw v. State*, 343 So. 2d 1290 (Fla. 3d DCA 1977).

¹²⁴ *Butler v. State*, 238 So. 2d 313 (Fla. 3d DCA 1970).

¹²⁵ *Purifoy v. State*, 359 So. 2d 446 (Fla. 1978); *see also Keese v. State*, 204 So. 2d 925 (Fla. 4th DCA 1968).

¹²⁶ *Purifoy v. State*, 359 So. 2d 446 (Fla. 1978); *see also Falcon v. State*, 226 So. 2d 399 (Fla. 1969); and *State v. Kahler*, 232 So. 2d 166 (Fla. 1970), dealing with the Food and Drug Laws.

^{126a} However, this exclusion has now been deleted from the statute. The current law defines cannabis in FLA. STAT. § 893.02(3): (3) "Cannabis" means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seed or resin.

6-242 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.6[A]

marijuana possessed is not merely mature stems on stalks. This was extremely important when the state is attempting to prove possession of more than five grams, ^{126b} since there must be greater than five grams after excluded matter is removed. Similarly, “cannabis” does not include the wrappings around a bale, soil commingled with it, or excess water that is not inherent in the plant. ^{126c}

Where a sale or possession of a specific drug is alleged, the sale or possession of that particular drug must be proved, so that where, for example, a sale of heroin is alleged it will be a fatal variance to prove a sale of morphine, even though it may be shown that both drugs may be opium derivatives. ¹²⁷ However, the Supreme Court of Florida recently held that a complaint accusing a defendant of possessing Lysergic Acid was sufficient although the actual substance in question was Lysergic Acid Diethylamide, since the former was a component of the latter. ¹²⁸ These two cases do not actually conflict, however, since the *Sobel* case is distinguishable from the *Jiminez* case. In the instant case the drug alleged to be possessed was of necessity included in the drug actually possessed by virtue of being a component part of it. Therefore, defendant was tried for possession of only the component in the charging document, since it, too, is a prohibited substance under FLA. STAT. § 893.03.

An interesting conflict has arisen in dealing with the problem of hashish, however. One court ¹²⁹ had held that where the state failed to prove hashish was a controlled substance under FLA. STAT. § 893.13(1)(c), or was a derivative of marijuana, and that where the court did not take judicial notice of this fact, the state failed to prove its charge against defendant. However, the Statute has since been amended to include the resin of cannabis. ^{129a} And since hashish is a resin of cannabis, possession of hashish and possession of marijuana are the same crime. ¹³⁰

^{126b} FLA. STAT. § 893.13(6)(b) now provides that the possession must be more than 20 grams for the offense to constitute a felony.

^{126c} Cronin v. State, 470 So. 2d 802, 804 (Fla. 4th DCA 1985).

¹²⁷ Jiminez v. State, 231 So. 2d 26 (Fla. 3d DCA 1970).

¹²⁸ St. v. Sobel, 363 So. 2d 324 (Fla. 1978).

¹²⁹ Casey v. State, 330 So. 2d 41 (Fla. 1st DCA 1976).

^{129a} FLA. STAT. § 893.02(2).

¹³⁰ Retherford v. State, 386 So. 2d 881, 882 (Fla. 1st DCA 1980). See also Braipard v. State, 380 So. 2d 1302 (Fla. 2d DCA 1980); Lewis v. State, 320 So. 2d 435 (Fla. 3d DCA 1975).

Similarly, it has been held that the term cannabis as used in FLA. STAT. § 893.03(1)(c) encompasses all types of cannabis, and the state need not prove which type was possessed by defendant.¹³¹ Also, cannabis has been held to be a synonym for marijuana, and so the state need not prove that marijuana is cannabis.¹³²

Interestingly, however, notwithstanding the fact that hashish is considered the same as marijuana for most offenses, hashish is excluded from the parameters of FLA. STAT. § 893.13(1)(f). That statute provides that possession, or delivery without consideration, of 20 grams or less of marijuana is only a misdemeanor. Consequently, possession of 20 grams or less of hashish is a felony.¹³³

In *Sims v. State*,¹³⁴ the Fourth District Court of Appeal reversed a conviction for possessing with intent to sell in excess of one hundred pounds of cannabis where there was no proof that there was such an amount of the drug. The chemist in question merely “guessed” that over one hundred pounds was present in the bales in question.

Similarly, in *Campbell v. State*,^{134a} it was held that the defendant could not be charged with trafficking where the chemist tested only one or two of the capsules found in a purse.

Where the State attempts to prove that a particular substance is contraband, there are various chemical tests which may be employed. It is beyond the scope of this text to explain each test, but when dealing with a problem concerning the proof of a drug, state attorneys and defense lawyers should consult the applicable treatises in this area. Each county sheriff’s laboratory should at least be able to provide the name of the treatises they rely on, if not provide the text itself.

However, in dealing with the proof that a substance is marijuana, the First District Court of Appeal has held that no scientific proof is required.

¹³¹ See *Hamilton v. State*, 366 So. 2d 8 (Fla. 1979); *Fotianos v. State*, 329 So. 2d 397 (Fla. 1st DCA 1976); *Nelson v. State*, 319 So. 2d 154 (Fla. 2d DCA 1976).

¹³² *Nebus v. State*, 317 So. 2d 784 (Fla. 2d DCA 1975).

¹³³ See also *Marshall v. State*, 381 So. 2d 276 (Fla. 5th DCA 1980).

¹³⁴ *Sims v. State*, 402 So. 2d 459 (Fla. 4th DCA 1981). See also *Gilberth v. State*, 563 So. 2d 1120, 1121 (Fla. 4th DCA 1990) (it had not been shown that the chemist witness was an expert in statistics); note 136f. below. Compare *Sanchez v. State*, 636 So. 2d 187 (Fla. 3d DCA 1994) (the state properly introduced a representative sample).

^{134a} *Campbell v. State*, 563 So. 2d 202 (Fla. 3d DCA 1990).

6–244 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.6[A]

In *Turner v. State*,¹³⁵ the court rejected the Minnesota rule which requires scientific proof, and adopted the rule of *Moore v. United States*,^{135a} which states that in addition to scientific tests, other facts tending to show the identity of the substance, such as its odor, its appearance, and the circumstances under which it was seized, are probative and can meet the state's burden.

It is important, however, to distinguish between the criminal court system and a school board disciplinary proceeding. In the latter situation, the proof of the identity of marijuana need only be established by lay testimony.¹³⁶

It should be noted, however, that regardless of the test employed, the state need not test every molecule of the alleged drug.^{136a} Testimony of a Forensic chemist, for example, that a randomly sampled portion of the material seized from the defendant tested positively as cannabis and that the entire bag weighed ten grams was held sufficient to sustain a conviction for possession of more than twenty grams.^{136b} The jury was allowed to decide the weight of this evidence.

In another case,^{136c} one court held that an expert witness' testimony that a random sample of the material seized tested out to be cannabis, and that it was his opinion that one-half of the material seized was cannabis, was sufficient evidence upon which the jury could convict defendant for possession.

However the Supreme Court of Florida has held that if the material seized contained matter that was not cannabis, the state should have to *prove* that

¹³⁵ *Turner v. State*, 388 So. 2d 254 (Fla. 1st DCA 1980). *See also* *Pama v. State*, 552 So. 2d 309 (Fla. 2d DCA 1989); *A.A. v. State*, 461 So. 2d 165, 166 (Fla. 3d DCA 1984); *State v. Raulerson*, 403 So. 2d 1102 (Fla. 5th DCA 1981). *Compare* *Jordan v. State*, 560 So. 2d 315 (Fla. 1st DCA 1990) (the defendant's statements do not suffice for this).

^{135a} *Moore v. U.S.*, 374 A.2d 299, 302 (D.C. App. 1977).

¹³⁶ *Forehand v. School Bd. of Washington County*, 481 So. 2d 953, 956 (Fla. 1st DCA 1986).

^{136a} *Wright v. State*, 351 So. 2d 1127 (Fla. 1st DCA 1977); *Ansley v. State*, 302 So. 2d 797 (Fla. 1st DCA 1974).

^{136b} *Wright v. State*, 351 So. 2d 1127 (Fla. 1st DCA 1977); *see also* *Hernandez v. State*, 369 So. 2d 76 (Fla. 3d DCA 1979); *Dorsey v. State*, 367 So. 2d 692 (Fla. 1st DCA 1979).

^{136c} *Ansley v. State*, 302 So. 2d 797 (Fla. 1st DCA 1974). *Compare* *Leavitt v. State*, 369 So. 2d 993 (Fla. 1st DCA 1979); and *above* note 134.

the cannabis itself, exceeds twenty grams of weight for such a conviction.^{136d}

Where the state has a substance tested, it appears that it must also provide some of it to the defendant upon request so that he might also have it tested. In *State v. Ritter*,^{136e} the court held that “it would be fundamentally unfair, as well as a violation of Rule 3.220, to allow the State to negligently dispose of critical evidence and then offer an expert witness whose testimony cannot be refuted.”

Where a particular drug statute prohibits the trafficking in, use, delivery, or possession of drugs above a certain weight, proof of the weight, excluding wrappings and other noncontraband material, also falls upon the state.^{136f}

Although it has been stated that the quantity of drugs possessed is immaterial for some possession offenses, it is important to realize that where only trace amounts of drug “lint” or “dust” are found, the presumption that one knowingly possesses drugs may not apply.^{136g} This is dismissed further in *above* section III.

B. Constitutionality

The inclusion of marijuana in FLA. STAT. ch. 398 (now repealed) has been held to be a valid exercise of the police power of the state and the entire narcotic drug law held to be constitutional.¹³⁷ According to that court,

^{136d} *Purifoy v. State*, 359 So. 2d 446 (Fla. 1978), decided when the amount needed to be proven was five grams. *See also* *Jordan v. State*, 419 So. 2d 363 (Fla. 1st DCA 1982)(proof that marijuana weighed in excess of 100 lbs.).

^{136e} *State v. Ritter*, 448 So. 2d 512, 514 (Fla. 5th DCA 1984). *Compare* *State v. Phillipe*, 402 So. 2d 33 (Fla. 3d DCA 1981) (breathalyzer ampoules need not be preserved).

^{136f} *Linder v. State*, 493 So. 2d 1091 (Fla. 4th DCA 1986); *see also* *Ross v. State*, 528 So. 2d 1237 (Fla. 3d DCA 1988) (by testing only two of ninety packets, the state failed to prove the amount of drugs necessary for trafficking); *Date v. State*, 528 So. 2d 547 (Fla. 3d DCA 1988) (the jury’s ambiguous verdict failed to demonstrate a conviction of possession of a certain weight of cannabis; and so he was deemed convicted of the misdemeanor offense of possession of less than twenty grams); *Easley v. State*, 509 So. 2d 1294 (Fla. 4th DCA 1987); *Velunza v. State*, 504 So. 2d 780 (Fla. 3d DCA 1987) (the state was not required to prove the precise weight of the cocaine, but rather that its weight was at least 400 grams).

^{136g} *Jones v. State*, 589 So. 2d 1001, 1002 (Fla. 3d DCA 1981).

¹³⁷ *Raines v. State*, 225 So. 2d 330 (Fla. 1969); *see also* *Mason v. State*, 382 So. 2d 705 (Fla. 1980), where the Supreme Court of Florida held that FLA. STAT. § 893.03(1)(c)4 is constitutional in listing cannabis as a schedule I drug; *Albo v. State*,

6–246 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.6[C]

marijuana is a “harmful, mind-altering drug,” that endangers the health of the user and is highly detrimental to the public welfare. In recent cases, the supreme court has toned down its condemnation of marijuana, but continues to hold that its inclusion in FLA. STAT. ch. 893 is not a violation of Equal Protection. The court reasons that since there is both evidence that marijuana is harmful and harmless, any reasonable doubts must be resolved in favor of the legislature.¹³⁸ This provides the rational basis necessary to classify cannabis as a hallucinogen.¹³⁹

The statutory provision prohibiting the possession of marijuana has also been held to be constitutionally valid even in the fact of defendant’s contention that the state may not interfere with the possession and use of marijuana by an individual in the privacy of his own home, on the basis of *Stanley v. Georgia*.¹⁴⁰ It was nonetheless held that marijuana does not enjoy the protection of the first amendment.¹⁴¹

Similarly, the Supreme Court of Florida has held that the use of cannabis may even be restricted where it infringes upon a religious practice. In *Town v. State*,^{141a} the court noted that cannabis remains a dangerous drug, that the followers of the church in question engaged in the indiscriminate use of it, and that a child who was not part of the church had access to the cannabis.

C. Charge

One court¹⁴² has held that since the state failed to allege that hashish is a derivative of cannabis, or failed to prove hashish was a controlled

379 So. 2d 648 (Fla. 1980), where the court held that it did not violate the Equal Protection clause to prohibit possession of greater than 100 lbs. of cannabis.

¹³⁸ See also *Cilento v. State*, 377 So. 2d 663, 665 (Fla. 1979).

¹³⁹ *Hamilton v. State*, 366 So. 2d 8 (Fla. 1979). See also *State v. Ashcraft*, 378 So. 2d 284 (Fla. 1979), where the court held that the language in FLA. STAT. § 951.22, which prohibits possessing an excitative drug in county detention centers, was sufficiently definite; *Fotianos v. State*, 329 So. 2d 397 (Fla. 1st DCA 1976) where the court held that FLA. STAT. § 893.02(2) provides a sufficient description of the prohibited substance to give notice to all persons of the illegality of their actions.

¹⁴⁰ *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

¹⁴¹ *Borras v. State*, 229 So. 2d 244 (Fla. 1969). See also *Maisler v. State*, 425 So. 2d 107 (Fla. 1st DCA 1982) (legislative proscription on private possession of cannabis is not violative of Art. I, § 28 of the Fla. Const., dealing with one’s right to privacy).

^{141a} *Town v. State*, 377 So. 2d 648, 651 (Fla. 1979).

¹⁴² *Casey v. State*, 330 So. 2d 41 (Fla. 1st DCA 1976); *But see Lewis v. State*, 320 So. 2d 435 (Fla. 3d DCA 1975).

§ 6.6[C]

DRUG OFFENSES

6-247

substance under FLA. STAT § 893.13(1)(e), [now FLA.STAT. § 893.13(6)(b)], and that since the court did not take judicial notice of either, the state failed to prove its charge against defendant.

On the other hand, it is clear that the state need not allege that any particular variety of cannabis was possessed or sold;¹⁴³ and even alleging that marijuana was possessed is not improper since it is a synonym for cannabis.¹⁴⁴

It has also been held proper to charge a defendant for “sale or delivery” of drugs, since this is but one offense which may be proved in two ways.¹⁴⁵

One problem which has not as yet been fully determined by the Florida courts is whether the state must allege that a sale was for consideration.

The Supreme Court of Florida held in the case of *Patterson v. State*¹⁴⁶ that since the state did not prove there was consideration, they failed to prove defendant sold drugs. However, this particular case contained a factual stipulation that there was no consideration, thus negating any possibility of a sale. In view of this, the Fourth District Court of Appeal has held that the state need not allege that a sale was for consideration unless there exists a factual stipulation such as in *Patterson*.¹⁴⁷ The court goes on to state the obvious, that by charging a sale the state has of necessity charged that it was for consideration, since this is an integral part of any sale.

Under this present statute,¹⁴⁸ however, it would seem that even in the case of a factual stipulation such as in *Patterson* there should be no need for the state to allege that there was consideration. This statute employs the language “sell. . .or deliver. . .” and so it would seem that if a transfer was alleged without consideration, “delivery” might still be proven.

Where the statute provides for increased punishment for the commission of successive related offenses, one may not be sentenced as a second or

¹⁴³ Hamilton v. State, 366 So. 2d 8 (Fla. 1979); Fotianos v. State, 329 So. 2d 397(Fla. 1st DCA 1976); Nelson v. State, 319 So. 2d 154 (Fla. 2d DCA 1975).

¹⁴⁴ Nebus v. State, 317 So. 2d 784 (Fla. 2d DCA 1975). See also above notes 129–133.

¹⁴⁵ Weinstein v. State, 348 So. 2d 1194 (Fla. 3d DCA 1977).

¹⁴⁶ Patterson v. State, 313 So. 2d 712 (Fla. 1975).

¹⁴⁷ Jackson v. State, 365 So. 2d 414 (Fla. 4th DCA 1978); see also State v. Stewart, 374 So. 2d 1381 (Fla. 1979).

¹⁴⁸ FLA. STAT. § 893.13.

third or subsequent offender without having been so charged and the allegations proved in an adversary proceeding conducted with all due process safeguards.¹⁴⁹

However, where three counts of an indictment state three separate crimes for which the defendant was convicted, the defendant is nonetheless required to be sentenced as a “first offender,” since it cannot be legally known that an offense has been committed until there has been a conviction, assuming the defendant had no prior convictions.¹⁵⁰

For a case which seems to suggest the possibility of arrest on the grounds of drunkenness, one who is under the influence of marijuana see *Trivette v. State*.¹⁵¹

In the interesting decision in *Dydek v. State*,^{151A} the defendant was charged with possessing or using a cigarette case for drug purposes. Since the case could be used to “contain or conceal” contraband, the charging document was upheld as sufficient, and would be so even under the new statute. However, since no evidence was adduced to the effect that the case was to be used for containing or concealing contraband, the defendant’s conviction was reversed. The fact that it contained other instruments which were themselves paraphernalia did not render the case paraphernalia also.

Where an information charged a defendant with possession of cannabis in excess of one hundred pounds and where the information cited the applicable statutes, it was also held valid.^{151b}

§ 6.7. TRAFFICKING^{151c}

Pursuant to FLA. STAT. § 893.135, anyone who knowingly sells, manufactures, delivers, brings into the state of Florida, or knowingly^{151d}

¹⁴⁹ *Johnson v. State*, 229 So. 2d 13 (Fla. 4th DCA 1969) where defendant was sentenced to 50 years in the state prison for a third conviction of the unlawful sale of narcotics.

¹⁵⁰ *Winstead v. State*, 91 So. 2d 809 (Fla. 1957).

¹⁵¹ *Trivette v. State*, 244 So. 2d 173 (Fla. 4th DCA 1971).

^{151A} *Dydek v. State*, 400 So. 2d 1255 (Fla. 2d DCA 1981). See also above § V, for drug paraphernalia offenses.

^{151b} *Kiddy v. State*, 378 So. 2d 1332 (Fla. 4th DCA 1980).

^{151c} See also above § IV, dealing with what constitutes a sale or delivery; and above § III, dealing with what constitutes possession.

^{151d} See also *Gartrell v. State*, 609 So. 2d 112 (Fla. 4th DCA 1992); *Ledo v. State*, 587 So. 2d 632 (Fla. 3d DCA 1991) (the state must prove the defendant’s knowledge of the nature of the substance possessed).

possesses large amounts^{151E} of cannabis, cocaine, morphine, opium, oxycodone, hydrocodone, hydromorphone, phencyclidine, methaqualone, amphetamine, methamphetamine, phenylacetone, phenylactic acid, ephedrine, flunitrazepam, or gamma-hydroxybutyric acid (GHB) is guilty of the offense of “trafficking” in these drugs.¹⁵²

In *Madruga v. State*,¹⁵³ the Third District Court of Appeal held that an experienced drug enforcement officer’s testimony that he delivered to the defendants seventy-five bales weighing from forty-one to fifty-five pounds a bale, along with two pictures of the contraband, was sufficient for a conviction. The court also held that it was irrelevant that the contraband was destroyed by the federal authorities prior to the trial.^{153A}

The evidence was also held sufficient to convict the defendant in *Robinson v. State*.¹⁵⁴ There, two marijuana-laden boats owned by him were found washed ashore in Florida shortly after a reported air drop of marijuana in the Bahamas. Substantial evidence showed the defendant’s direct involvement in the trafficking scheme notwithstanding that he was never placed on one of the boats during the journey.

On the other hand however, in *Freyre v. State*,^{154A} the defendant’s

^{151E} See for example, *Williams v. State*, 592 So. 2d 737, 738 (Fla. 1st DCA 1992) (the state must prove that the amount of cocaine involved was 28 grams or more). Compare *State v. Di Loreto*, 600 So. 2d 25 (Fla. 4th DCA 1992) (oxycodone is not a drug covered by this statute). Above note 134a.

¹⁵² FLA. STAT. § 893.135. See also *Hallman v. State*, 633 So. 2d 1116 (Fla. 3d DCA 1994) (the offense is complete once the defendant is knowingly in actual or constructive possession of the drugs); *State v. Leicht*, 402 So. 2d 1153, 1155 (Fla. 1981), where the Supreme Court of Florida held that FLA. STAT. § 893.135 did not violate the equal protection clause by virtue of only covering a limited number of drugs. At the time of that decision, the statute only applied to cannabis, cocaine, morphine, and opium; *Kalinosky v. State*, 414 So. 2d 234 (Fla. 4th DCA 1982) (statute is constitutional).

¹⁵³ *Madruga v. State*, 434 So. 2d 331 (Fla. 3d DCA 1983). Compare *Ross v. State*, 528 So. 2d 1237 (Fla. 3d DCA 1988) (by testing only 2 of 90 packets, the State failed to prove the amount of drugs necessary for trafficking). See also § VI, A, above.

^{153A} Compare above note 136e.

¹⁵⁴ *Robinson v. State*, 438 So. 2d 949 (Fla. 4th DCA 1983). For other cases upholding trafficking convictions, see also *Carlson v. State*, 454 So. 2d 623 (Fla. 2d DCA 1984); *Stanley v. State*, 451 So. 2d 897 (Fla. 4th DCA 1984).

^{154A} *Freyre v. State*, 448 So. 2d 618 (Fla. 4th DCA 1984). See also *Wallace v. State*, 553 So. 2d 777 (Fla. 4th DCA 1989) (mere proximity to drugs held insufficient); *Sobrinio v. State*, 471 So. 2d 1333 (Fla. 3d DCA 1985) (a purchaser of cannabis commits only the offense of possession, not trafficking).

conviction was reversed since the evidence did not establish that he had either actual or constructive possession of the drugs in question.

In the interesting decision in *Wiesenberg v. State*,^{154B} the Fifth District Court of Appeal held that a defendant could be convicted of trafficking in a particular substance as long as he is cognizant of the identity of the substance,^{154c} and the weight of the substance is sufficient to fall under FLA. STAT. § 893.135. The defendant need not have knowledge of the weight. In that case, the defendant was convicted under subsection (1)(b) of that statute by virtue of trafficking in more than twenty-eight grams of cocaine, notwithstanding that he did not know that the weight of the drug exceeded twenty-eight grams.

The “knowledge” requirement does not mean, however, that a person is guilty of trafficking merely because he knows of the presence of drugs, knows his companions are engaged in trafficking at the moment, and goes along for the ride.^{154d} The suspect must himself violate the law.

The question of whether the statutes prohibiting the sale, delivery or trafficking in drugs also prohibit law enforcement officers from engaging in “reverse sting” operations has been answered in the negative. In *State v. Buss*,^{154e} the court so held; and also held that officers need no specific statutory authority to engage in such operations. Also, this does not constitute entrapment.^{154f}

In *Diaz v. State*,¹⁵⁵ the drug trafficking statute was upheld as constitutional.

^{154B} *Wiesenberg v. State*, 455 So. 2d 633 (Fla. 5th DCA 1984).

^{154c} *Wiesenberg v. State*, 455 So.2d 633 (Fla. 5th DCA 1984), *citing*, *State v. Ryan*, 413 So. 2d 411 (Fla. 4th DCA 1982). *See also* *Way v. State*, 475 So. 2d 239 (Fla. 1985); *Resbach v. State*, 462 So. 2d 62 (Fla. 1st DCA 1984) (the state must prove the elements of intent and knowledge).

In *State v. Wise*, 464 So. 2d 1245 (Fla. 1st DCA 1985), the court also held that intent is to be determined by the trier of fact.

^{154d} *Harris v. State*, 501 So. 2d 735 (Fla. 3d DCA 1987). *Compare* *Ellis v. State*, 528 So. 2d 1327 (Fla. 5th DCA 1988) where the defendant kept the key to the shed in which the drugs were kept, he was guilty of attempted trafficking).

^{154e} *State v. Bass*, 451 So. 2d 986 (Fla. 2d DCA 1984).

^{154f} *State v. Bass*, 451 So.2d 986 (Fla. 2d DCA 1984). *See also* FLA. STAT. § 893.13(c), (1984). Entrapment is discussed *above* in Ch. 1.

¹⁵⁵ *Diaz v. State*, 441 So. 2d 1125 (Fla. 1st DCA 1983). *See also* *Breines v. State*, 462 So. 2d 831 (Fla. 4th DCA 1984).

§ 6.7

DRUG OFFENSES

6–251

When an individual is convicted of trafficking in drugs, he is subject to the minimum mandatory penalties prescribed by FLA. STAT § 893.135.^{155a} The trial court may not reduce or suspend the mandatory penalty until the state attorney files a motion to mitigate.¹⁵⁶ In addition, personal property used in the commission of the offense may be forfeited. This is discussed *below* in section VIII.

Section 893.135(3) also provides that adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld for those convicted of drug trafficking, and such persons shall not be eligible for parole prior to serving a minimum mandatory sentence.

Any defendant who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals, may be eligible for a reduction or suspension of his sentence. Section 893.135 (4) provides that in such a case, the state attorney may move the court to reduce or suspend the sentence. However, the arresting agency must be given an opportunity to speak either in aggravation or in mitigation at the hearing, and the judge may only reduce or suspend a sentence upon good cause being shown. This provision has been held constitutional by the Florida courts.^{156a}

In *Manager v. State*, the Fourth District Court of Appeals held that a defendant in possession of hydrocordone pills containing .7 grams of hydrocordone for a total weight of 70 grams of hydrocordone was correctly charged with trafficking in hydrocordone.^{156b} And the Florida Supreme Court has held that the drug trafficking statute does not apply to possession of hydrocordone in amounts under 15 milligrams per dosage unit, and thus the statute did not apply to tablets of prescription pain reliever possessed by the defendant that contained only 7.5 milligrams of hydrocordone per dosage unit, although the total aggregate weight of the tablets exceeded four grams; only hydrocordone in excess of 15 milligrams per dosage unit could

^{155a} See also *Campbell v. State*, 517 So. 2d 696 (Fla. 2d DCA 1987) (the imposition of a mandatory \$50,000.00 fine was constitutional; *Munroe v. State*, 514 So. 2d 397, 400 (Fla. 1st DCA 1987) (where the minimum mandatory sentence is greater than the recommended guidelines sentence, the statutory sentence becomes the presumptive sentence).

¹⁵⁶ *Morris v. State*, 456 So. 2d 471 (Fla. 3d DCA 1984).

^{156a} *State v. Werner*, 402 So. 2d 386 (Fla. 1981); *Stone v. Stone*, 402 So. 2d 1330 (Fla. 1st DCA 1981).

^{156b} *Manager v. State*, 758 So.2d 713 (4th DCA 2000).

be a Schedule II substance to which the statute applied, abrogating *Baxley*, 684 So. 2d 831.^{156c}

§ 6.8. FORFEITURES

A. General

Section 932.701–932.707 is known as the “Florida Contraband Forfeiture Act,” and provides for the forfeiture of both real and personal property used to further certain criminal offenses.^{156d} And even an acquittal in the criminal case does not prevent the forfeiture eviction action from taking place.^{156e}

In *State v. Peters*,¹⁵⁷ dealing with the forfeiture of an automobile, the court held that such vehicle could be forfeited notwithstanding that the bulk of the marijuana in question was found in a place other than the defendant’s vehicle if the state could prove that the vehicle was used to transport the drugs.

However, the Third District Court of Appeal has held that in order for a forfeiture to be allowed, the owner of the vehicle must be “significantly” involved in the furtherance of an illegal drug “operation” (emphasis added).^{157a} The Supreme Court of Florida agreed with this construction of the statutes in the case of *Griffis v. State*.^{157B} The court explained that the legislative intent mandated this construction, and reiterated that the

^{156c} *Hayes v. State*, 750 So.2d 1 (Fla. 1999).

^{156d} See also FLA. STAT. § 843.18 which provides that boats may be forfeited where the owners thereof willfully refuse to obey a lawful order to stop and FLA. STAT. §§ 329.10 and 329.11, dealing with the forfeitures of airplanes for registration and identification numbers violations; *In re Forfeiture of 1978 BMW Auto.*, 524 So. 2d 1077, 1079 (Fla. 2d DCA 1988) (an act committed by a juvenile that would be a felony if committed by an adult qualifies as a felony under FLA. STAT. § 932.701(2)(e)). Compare *Byrom v. Gallagher*, 609 So. 2d 24, 26 (Fla. 1992) (forfeiture statutes are not favored, and so are to be strictly construed).

^{156e} *City of Miami v. Barclay*, 563 So. 2d 203 (Fla. 3d DCA 1990). See also *City of Cape Coral v. Burgess*, 600 So. 2d 1178 (Fla. 2d DCA 1992).

¹⁵⁷ *State v. Peters*, 401 So. 2d 838 (Fla. 2d DCA 1981). See also *Smith v. Caggiano*, 496 So. 2d 853 (Fla. 2d DCA 1987) (vehicle in which the defendant drove to commit unlawful wagering could be forfeited).

^{157a} *In re Forfeiture of 1969 Chevrolet Camaro*, 334 So. 2d 82 (Fla. 3d DCA 1976). See also *In re Forfeiture of 1972 Porsche*, 307 So. 2d 451 (Fla. 3d DCA 1975).

^{157B} *Griffis v. State*, 356 So. 2d 297 (Fla. 1978).

violation must be in furtherance of an illegal drug “operation” (emphasis added).

This reasoning was also followed by the First District Court of Appeal in the case of *Brown v. State*,^{157c} where the court held that an automobile may only be forfeited upon a showing of a nexus between the illegal drugs seized therein and a “significant” involvement in the furtherance of an illegal drug “operation” (emphasis added).

However, The Fourth District Court of Appeal held contrary to the above decision in the case of *Mosley v. State*.¹⁵⁸ There, the court rejected the view that there must be a significant involvement in a criminal enterprise, choosing instead to follow a federal decision¹⁵⁹ that upheld the forfeiting of vehicles for “facilitating” drug trafficking (emphasis added).^{159a} The Florida statute¹⁶⁰ does use the term “facilitates,” but as previously mentioned, the Supreme Court of Florida construed the legislative intent to be such as to mandate the requirement that there be a drug “operation” (emphasis added).¹⁶¹ Indeed, the court stated that it agreed with the decisions of the Third District Court of Appeal¹⁶² mandating both that the person be significantly involved^{162a} and that there be a furtherance of a drug operation.

Subsequent to the *Griffis* decision, however, the Forfeiture Act was amended several times. Section 932.701(2)(a)5 and 6 now provide that any real or personal property which was used or was attempted to be used as an *instrumentality* in the commission of a felony, or in aiding or abetting in the commission of a *felony*, or which is acquired with the proceeds as a result of a violation of the Forfeiture Act, constitutes contraband.

^{157c} *Brown v. State*, 357 So. 2d 472 (Fla. 1st DCA 1978).

¹⁵⁸ *Mosley v. State ex rel. Broward County*, 363 So. 2d 172 (Fla. 4th DCA 1978); *see also State ex rel. City of Ft. Lauderdale v. Franzer*, 364 So. 2d 62 (Fla. 4th DCA 1978).

¹⁵⁹ *United States v. Buick Sedan*, 231 F.2d 219 (3d Cir. 1956).

^{159a} *See also Booker v. State*, 417 So. 2d 279 (Fla. 1st DCA 1982) (“facilitating” held sufficient to justify forfeiture).

¹⁶⁰ FLA. STAT. § 932.702(3).

¹⁶¹ *Griffis v. State*, 356 So. 2d 297 (Fla. 1978).

¹⁶² *See* footnote 155.

^{162a} *See also One 1978 Lincoln v. State*, 388 So. 2d 1383 (Fla. 2d DCA 1980), where the court held that mere possession of contraband is not sufficient for forfeiture purposes. The vehicle must be significantly involved in drug trafficking.

6–254 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.8[A]

However, whereas the above mentioned statutes limit “contraband” to that property which was used as an actual *instrumentality*, and also to *felonies*, FLA. STAT. § 932.702(1) does not. Under that statute, transporting, carrying or conveying *any* contraband article in, upon, or by means of any vessel, motor vehicle, or aircraft violates the Act and makes any such vehicle, aircraft or vessel subject to being forfeited. Subsection (2) prohibits concealing or possessing *any* contraband article in or upon any vessel, vehicle, aircraft, *or other personal or real property*. Subsection (3) prohibits using any vessel, vehicle or aircraft to *facilitate* the transportation, etc. of any contraband article.

Consequently, where property is used as an *instrumentality* in the commission of a *felony*, such property is subject to forfeiture.^{162b} In addition, however, where contraband such as even a small amount of drugs, etc., is transported, concealed or even merely possessed in a vehicle, vessel or aircraft, or any other property, such vehicle or other property is subject to forfeiture.^{162c} Also, where any vessel, vehicle, aircraft, or other property are used to even merely “facilitate” the transportation, concealment, possession, purchase, sale, etc. of contraband, such property is subject to forfeiture.

Recently, however, Florida adopted both an instrumentality and a proportionality test for determining whether a forfeiture constitutes an excessive fine.^{162d} In *In re Forfeiture of 1990 Chevrolet Blazer*, the forfeiture of a Blazer that was worth twice what an allowable fine would have been, was held unlawful.^{162e 162f}

Of course, mere “suspicion” that a vehicle was used in a drug operation is never sufficient to allow a forfeiture thereof; and probable cause must exist.^{162g} Similarly, it had been held that noforfeiture shall be had for

^{162b} FLA. STAT. § 932.701(2)(a)5 and 6. *See also In re Forfeiture of a 1986 Ford*, 619 So. 2d 337 (Fla. 2d DCA 1993) (a pickup truck was an instrumentality of fellatio performed on its owner by a minor).

^{162c} FLA. STAT. § 932.702(1) and (2). *Compare City of Tampa Police Department v. Acosta*, 645 So. 2d 551 (Fla. 2d DCA 1994), *citing Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (a forfeiture may constitute an excessive fine under the Eighth Amendment).

^{162d} *In re Forfeiture of 1990 Chevrolet Blazer*, 684 So. 2d 197 (Fla. 2d DCA 1996).

^{162e} *In re Forfeiture of 1990 Chevrolet Blazer*, 684 So. 2d 197 (Fla. 2d DCA 1996).

^{162f} [Reserved]

^{162g} *Wanicka v. One 1979 Ford Bronco*, 432 So. 2d 581 (Fla. 2d DCA 1983); *see*

§ 6.8[A]

DRUG OFFENSES

6–255

merely “attempting” to use the vehicle for transporting drugs, etc. There must have been an *actual* use of the vehicle in violating those laws.^{162h} However, FLA. STAT. § 932.701(2)(a)5 and 6 now provide that forfeitures will lie for any real or personal property attempted to be used as an instrumentality in the commission of, or in the aiding and abetting of, any felony. Apparently, they still will not lie for violations of FLA. STAT. § 932.702.

It is clear, however, that an innocent person’s vehicle may not be forfeited. Section 932.706 specifically provides that the forfeiture provisions do not apply to innocent parties.¹⁶²ⁱ For instance, where property is held by the entirety, it is not subject to forfeiture where only one spouse acts alone.^{162j} Similarly, where a parent “neither knew nor should have known after a reasonable inquiry” that her son was using her vehicle in a criminal activity, the parent’s vehicle was not subject to forfeiture.^{162k} Section 932.703(6)(b) also protects innocent perfected lien holders; and subsection (d) protects the innocent owners of rental vehicles. Subsection (7) of FLA. STAT. § 932.703 protects the innocent co-owners of property held as tenants in common or as joint tenants with a wrongdoer. Only the portion of property held by a wrongdoer may be forfeited. It is also important to point out that homestead property is not subject to forfeiture.^{162l}

also In re Forfeiture of \$62,200 in U.S. Currency v. Florida Dep’t of Hwy. Safety & Motor Vehicles, 531 So. 2d 352 (Fla. 1st DCA 1988) (a diminimus amount of drugs found in the car did not give rise to probable cause that the money in the trunk was from a drug sale); Chapter 1, § III (E), dealing with probable cause in general.

^{162h} *Coleman v. Brandon*, 426 So. 2d 44 (Fla. 2d DCA 1982); *see also In re* Forfeiture of a Cessna 421 Aircraft, 450 So. 2d 1138 (Fla. 4th DCA 1984) (mere ability to use property in violation of the act does not subject the property to forfeiture).

¹⁶²ⁱ *See also* Department of Law Enforcement v. Real Prop., 588 So. 2d 957, 968 (Fla. 1991) (innocence need only be proved by a preponderance of the evidence). *Compare In re* Forfeiture of Approximately \$19,050.00 in U.S. by Currency, 519 So. 2d 1134 (Fla. 5th DCA 1988) (mere possession of currency is not legally determinative of ownership).

^{162j} FLA. STAT. § 932.703(6)(c); *see In re* Forfeiture of 1985 Ford Ranger Pickup Truck, 598 So. 2d 1070 (Fla. 1992) (this statute does not violate due process or equal protection); *see also* Smith v. Hindery, 454 So. 2d 663 (Fla. 1st DCA 1984).

^{162k} *In re* Forfeiture of Blue 1979 2-Door Toyota, 441 So. 2d 697 (Fla. 4th DCA 1983). *Compare* cases contained therein. *See also* Wheeler v. State, 472 So. 2d 847 (Fla. 1st DCA 1985) (car lent to a friend to “run errands”). *Compare In Re* Forfeiture of 1981 Oldsmobile, 593 So. 2d 1087 (Fla. 1st DCA 1992) (a wife’s vehicle was forfeited since she knew of her husband’s activities).

^{162l} *Butterworth v. Caggiano*, 605 So. 2d 56, 59 (Fla. 1992).

6-256 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.8[A]

However, the interest of a nonperfected lienholder does not prevent forfeiture.¹⁶³ Similarly, a corporation that claimed ownership of a vehicle could not contest its forfeiture where the corporation did not hold the certificate of title.^{163a}

Section 843.18 also provides that boats may be forfeited where the owners thereof willfully refuse to obey a lawful order to stop, and FLA. STAT. §§ 329.10 and 329.11 provide that airplanes may be forfeited for certain registration violations and for altering identification numbers, respectively.^{163a1} Similarly, in *State Department of Natural Resources v. Jonny's Coral Maintenance Corp.*,^{163a2} a boat was held subject to forfeiture where the owner engaged in fictitious registration of it; and in *City of Sweetwater v. Zaldivar*,^{163a3} a vehicle was forfeited where the owner thereof used a false name on a title application.

In one case,^{163b} a van was held to constitute “contraband.” On the other hand, in two other cases^{163c} vans allegedly used in the commission of aggravated assaults were held to be not subject to forfeiture.

Where currency is found in a vehicle, a question arises as to whether it is drug money. In *In re Forfeiture of 1987 Cadillac*,^{163D} currency that was found “uniquely folded in one hundred dollar increments,” and with a crack pipe, was forfeited as contraband. However, where currency is otherwise found in a vehicle or elsewhere, it may not be forfeited absent

¹⁶³ *Smith v. City of Miami Beach*, 440 So. 2d 611 (Fla. 3d DCA 1983); *see also In re Forfeiture of One 1975 35' Cigarette Boat*, 498 So. 2d 960 (Fla. 3d DCA 1986)(lienholder failed to prove such).

^{163a} *Lamar v. Wheels Unlimited, Inc.*, 513 So. 2d 135 (Fla. 1987). *Compare* *Byrom v. Gallagher*, 609 So. 2d 24 (Fla. 1992) (all one needs to be is a bona fide purchaser).

^{163a1} *Compare* *Elliot v. Aircraft Engineering, Inc.*, 532 So. 2d 1123, 1124 (Fla. 2d DCA 1988) (not prior to the effective date of the statute); *In re Forfeiture of 1969 Piper Navaho*, 570 So. 2d 1357 (Fla. 4th DCA 1990) (FLA. STAT. § 330.40 which provides that aircraft with extra fuel tanks are contraband, held unconstitutional).

^{163a2} *State Department of Natural Resources v. Jonny's Coral Maint. Corp.*, 552 So. 2d 1130 (Fla. 3d DCA 1989).

^{163a3} *City of Sweetwater v. Zaldivar*, 559 So. 2d 660 (Fla. 3d DCA 1990).

^{163b} *One 1976 Dodge Van v. State*, 447 So. 2d 984 (Fla. 1st DCA 1984).

^{163c} *Lamar v. Universal Supply Co.*, 452 So. 2d 627 (Fla. 5th DCA 1984); *Crawford v. Sheriff of Orange County*, 441 So. 2d 646 (Fla. 5th DCA 1983).

^{163D} *In re Forfeiture of 1987 Cadillac*, 576 So. 2d 900 (Fla. 1st DCA 1991).

§ 6.8[A]

DRUG OFFENSES

6–257

a showing that it was connected with drug dealing, even if it is a large sum.^{163e}

The statute of limitations for forfeiture proceedings is four years.¹⁶⁴

It is also important to note that forfeiture proceedings are civil in nature, and as such, the criminal judgment is not admissible in the proceeding,^{164a} nor is a “beyond a reasonable doubt” standard applicable.^{164a1} Notwithstanding their civil nature, however, the exclusionary rule is applicable to forfeiture proceedings.^{164b} However, where jeopardy did not attach in the criminal proceeding, the issue of the legality of obtaining the evidence may be relitigated.^{164c} Defendants are also not entitled to orders finding them partially indigent for appeals under the rules of criminal procedure, since the action is a civil one.^{164d}

Where a property owner successfully defends a forfeiture proceeding,^{164d1} he has a right to claim any applicable storage fees,^{164D2} and damages to the property.^{164D3} However, attorney’s fees against the local government involved are not authorized.^{164d4}

^{163e} See *Lamboy v. State*, 575 So. 2d 1317 (Fla. 3d DCA 1991) (\$82,050 found hidden in a house was not shown to be connected to a drug transaction); *In re Forfeiture of \$37,388.00*, 571 So. 2d 1379 (Fla. 1st DCA 1990) (currency found in suitcase located in the trunk of a vehicle was not subject to forfeiture).

¹⁶⁴ *Mosley v. State ex rel. Broward County*, 363 So. 2d 172 (Fla. 4th DCA 1978), construing FLA. STAT. § 95.11(3)(n).

^{164a} *Willie v. Karrh*, 423 So. 2d 963 (Fla. 4th DCA 1982).

^{164a1} See FLA. STAT. § 932.704(8); *Department of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 968 (Fla. 1991) (clear and convincing evidence is required). Compare above note 162, and below note 164d1.

^{164b} *In re Forfeiture of a 1981 Ford*, 432 So. 2d 732 (Fla. 4th DCA 1983); see also *In re Forfeiture of Approximately 48,900.00*, 432 So. 2d 1387 (Fla. 4th DCA 1983) (“untainted evidence”). But see above note 164a.

^{164c} *In re Forfeiture of a 1981 Ford*, 432 So. 2d 732 (Fla. 4th DCA 1983); see also *In re Forfeiture of Approximately 48,900.00*, 432 So. 2d 1387 (Fla. 4th DCA 1983) (“untainted evidence”).

^{164d} *One 1976 Dodge Van v. State*, 447 So. 2d 984, 986 (Fla. 1st DCA 1984).

^{164d1} See also *Department of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 968 (Fla. 1991) (the defense of innocence is proved by a preponderance of the evidence). Compare above note 164a1.

^{164D2} *One 1978 Green Datsun Pickup Truck v. State*, 457 So. 2d 1060 (Fla. 2d DCA 1984).

^{164D3} *Morton v. Gardner*, 513 So. 2d 725, 731 n.15 (Fla. 3d DCA 1987).

^{164d4} *City of Miami Beach v. Bules*, 479 So. 2d 205 (Fla. 3d DCA 1985). Compare below note 165.

6–258 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.8[B]

It is also important to realize that the constitutional prohibition against taking private property for public use without just compensation applies equally to real and personal property.^{164d5} Consequently, where property is wrongfully forfeited, a claim for inverse condemnation will lie.^{164d6}

For additional coverage of this act, see Zelman & Zelman, “The Florida Contraband Forfeiture Act,” Vol. LVII, No. 9, FLA. B.J. 550 (Oct. 1983).

B. Procedure

Section 932.704 governs forfeiture proceedings that are civil in nature.^{164e} The Rules of Civil Procedure control,^{164f} and a clear and convincing standard of evidence applies.^{164f1} Since the proceeding is separate from the criminal one, the criminal conviction or acquittal cannot be introduced.^{164F2}

Section 932.703(2)(b) provides that real property may only be initially seized by the use of a *lis pendens*. Furthermore, if the court at the initial hearing determines that probable cause exists to forfeit *any* property, it shall order such property restrained by the least restrictive means until the disposition of the forfeiture proceeding.^{164f3}

In order to provide procedural due process, the Fourth District Court of Appeal has held that FLA. STAT. § 932.704 *impliedly* contains a rule to “show cause.” Consequently, the rule to show cause must be signed by the judge upon a determination that the allegations of the petition are sufficient and not frivolous.^{164g} Although a hearing must generally be convened to

^{164d5} *In re* Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So. 2d 261, 263 (Fla. 1990).

^{164d6} *In re* Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So. 2d 261, 263 (Fla. 1990).

^{164e} See above note 164b. Compare *In re Forfeiture of \$48,900*, 432 So. 2d 1382, 1385 (Fla. 4th DCA 1983)(they are also “quasi-criminal” in nature); see also *Department of Law Enforcement v. Real Prop.*, 588 So. 2d 957 (Fla. 1991), dealing with due process safeguards.

^{164f} FLA. STAT. § 932.704(2); see also *Paredes v. Cochran*, 666 So. 2d 991 (Fla. 4th DCA 1996) (service of process is controlled by the rules of civil procedure).

^{164f1} FLA. STAT. § 932.704(8). Compare above note 162 (an innocent owner need only prove that fact by a preponderance of the evidence).

^{164F2} *State v. Cobb*, 440 So. 2d 65 (Fla. 1st DCA 1983).

^{164f3} FLA. STAT. § 932.703(2)(d).

^{164g} *In re* Forfeiture of \$5,300.00, 429 So. 2d 800, 802–803 (Fla. 4th DCA 1983) (contradicting TRAWICK, FLORIDA PRACTICE AND PROCEDURE, § 9–2 (1979)).

§ 6.8[B]

DRUG OFFENSES

6–259

allow an owner to present his evidence,^{164h} no hearing is required to procure issuance of a rule to show cause.¹⁶⁴ⁱ Similarly, it has been held^{164j} that no due process violation occurs by virtue of the fact that no hearing prior to the actual seizure of property is provided for. However, the state must promptly file a forfeiture action following a seizure.^{164k} It is interesting to note that a seizure of property may even be accomplished without the necessity of an arrest where the owner of the property in question is unknown.^{164k1}

The initial burden in any forfeiture proceeding is upon the governmental entity.^{164l} Once that is established, however, the burden shifts to the defendant to either rebut the evidence, to show by a preponderance of the evidence that the forfeiture statute was not violated, or that there is an affirmative defense entitling him to repossess the property.^{164m} If the

^{164h} *Barton v. State*, 448 So. 2d 53 (Fla. 5th DCA 1984). *Compare* *Brown v. State*, 559 So. 2d 717–718 (Fla. 1st DCA 1990) (an individual in jail has no right to appointed counsel for a forfeiture proceeding).

¹⁶⁴ⁱ *City of Pompano Beach v. Bardua*, 455 So. 2d 498 (Fla. 4th DCA 1984).

^{164j} *Lamar v. Universal Supply Co.*, 479 So. 2d 109 (Fla. 1985) (several week delay held to be proper); *see also In re Forfeiture of One 1981 Chevrolet*, 468 So. 2d 1093 (Fla. 4th DCA 1985). *Compare* *Department of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 964 (Fla. 1991) (the state must use means less restrictive than seizure where feasible under the circumstances in dealing with real property).

^{164k} FLA. STAT. § 932.704(4); *see also* FLA. STAT. § 932.703(3) which provides for a replevin action if forfeiture proceedings are not initiated within forty-five days of the seizure, or, if good cause is shown, within sixty days of the seizure.

^{164k1} *National Fisherman Producers Coop. Society, Ltd., of Belize City v. State*, 503 So. 2d 430, 431 n.1 (Fla. 3d DCA 1987).

^{164l} *Lamar v. Hayes*, 442 So. 2d 307 (Fla. 5th DCA 1983); *see also* *State v. Cobb*, 400 So. 2d 65, 68 (Fla. 1st DCA 1983) (the state has the burden of justifying any significant delay). *Compare In re Forfeiture of One 1978 Hydroste Boat*, 442 So. 2d 1088 (Fla. 2d DCA 1983) (latches did not exist where no forfeiture proceeding was begun for fourteen months where defendant was not prejudiced); *see also above* note 164a1, where it is explained that the government must meet the clear and convincing standard of evidence.

^{164m} *See also* *Barnett v. State*, 483 So. 2d 63 (Fla. 2d DCA 1986) (claimant's testimony held sufficient to require further evidence from the state); *In re Forfeiture of \$106.00*, 448 So. 2d 1146 (Fla. 4th DCA 1984) (wife of former owner was entitled to intervene); *Medious v. Department of Hwy. Safety & Motor Vehicles*, 534 So. 2d 729, 732 (Fla. 5th DCA 1988); *Crenshaw v. State*, 521 So. 2d 138, 142 (Fla. 1st DCA 1988); *In re Forfeiture of 1983 Wellcraft Scarab*, 487 So. 2d 306, 309 (Fla. 4th DCA 1986) (the burden of establishing standing in forfeiture proceedings is on the claimant); *above* notes 162i–162l. *See also above* note 162i, where it is explained that innocence

6-260 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.8[B]

defendant is successful, the court should then order the property returned.^{164N}

It is important to note, however, that for a person to seek the return of property, he cannot be an assignee of a fictitious owner.^{164o}

An owner's "preferred" procedure has been held to be filing a responsible pleading in accordance with Rule 1.140, even if not required by the rule to show cause.^{164p} The owner must first receive proper notice of the proceeding.^{164q} Also, the court in which the criminal charge is pending is the proper court in which to decide whether property is to be forfeited.^{164r}

Where property was obtained by the state illegally, the exclusionary rule acts to bar its forfeiture. However, where jeopardy did not attach in the criminal proceeding, the issue of whether the evidence is tainted may be relitigated.^{164s}

Where an owner is successful in recovering his vehicle or other property, storage fees^{164t} and damages to the property^{164u} have been held to be part of the costs he may recover. At least one court has held that a lienholder may also be able to recover attorney's fees from the police department if the security agreement provided for them.¹⁶⁵

need only be proven by a preponderance of the evidence. *Compare In re Forfeiture of 1986 Ford*, 619 So. 2d 337 (Fla. 2d DCA 1993) (the owner waived his due process rights by not challenging the Forfeiture in a timely fashion).

^{164N} *In re Forfeiture of \$48,900.00*, 432 So. 2d 1382 (Fla. 4th DCA 1983).

^{164o} *In re Forfeiture of a Cessna*, 431 So. 2d 674 (Fla. 4th DCA 1983).

^{164p} *In re Forfeiture of One 1978 Hydroste Boat*, 442 So. 2d 1088 (Fla. 2d DCA 1983); *see also Lamar v. Universal Supply Co.*, 452 So. 2d 627, 632 (Fla. 5th DCA 1984) (where property is seized without a warrant, the owner should file a replevin action if prior to the filing of a criminal charge or forfeiture proceeding being filed against him).;

^{164q} *See In re Forfeiture of One 1978 Corvette*, 447 So. 2d 1031 (Fla. 4th DCA 1984) (a prisoner's notice was sent to his home and returned unclaimed; and published in a newspaper; this violated due process). *Compare Owen v. State*, 483 So. 2d 453 (Fla. 1st DCA 1986) (notice held sufficient).

^{164r} *Lamar v. Universal Supply Co.*, 452 So. 2d 627, 631 (Fla. 5th DCA 1984).

^{164s} *In re Forfeiture of a 1981 Ford*, 432 So. 2d 732 (Fla. 4th DCA 1983); *see also Indialantic Police Dep't v. Zimmerman*, 677 So. 2d 1307 (Fla. 5th DCA 1996); *above note 164b. But see Wille v. Karrh*, 423 So. 2d 963 (Fla. 4th DCA 1982).

^{164t} *One 1978 Green Datsun Pickup Truck v. State*, 457 So. 2d 1060 (Fla. 2d DCA 1984).

^{164u} *Morton v. Gardner*, 513 So. 2d 725, 731 n.15 (Fla. 3d DCA 1987).

¹⁶⁵ *In re Forfeiture of 1978 Cadillac 4-Door*, 451 So. 2d 1054 (Fla. 4th DCA 1984). *Compare above note 164d2.*

§ 6.9

DRUG OFFENSES

6–261

§ 6.9. RICO (Racketeer Influenced and Corrupt Organization)

In an attempt to combat organized crime within the state of Florida, the legislature enacted FLA. STAT. § 895.01 known as the Florida RICO (Racketeer Influenced and Corrupt Organization) Act. An in-depth discussion of this act is beyond the scope of this chapter, but the Act itself provides as follows:

895.02 Definitions.

As used in ss. 895.01–895.08, the term:

(1) “Racketeering activity” means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:

- 1 Section 210.18, relating to evasion of payment of cigarette taxes.
2. Section 403.727(3)(b), relating to environmental control.
3. Section 414.39, relating to public assistance fraud.
4. Section 409.920, relating to Medicaid provider fraud.
5. Section 440.105 or s. 440.106, relating to workers’ compensation.
6. Part IV of chapter 501, relating to telemarketing.
7. Chapter 517, relating to sale of securities and investor protection.
8. Section 550.235, s. 550.3551, or s. 550.3605, relating to dogracing and horseracing.
9. Chapter 550, relating to jai alai frontons.
10. Chapter 552, relating to the manufacture, distribution, and use of explosives.

- 11 Chapter 560, relating to money transmitters, if the violation is punishable as a felony.
12. Chapter 562, relating to beverage law enforcement.
13. Section 624.401, relating to transacting insurance without a certificate of authority, s. 624.437(4)(c)1., relating to operating an unauthorized multiple-employer welfare arrangement, or s. 626.902(1)(b), relating to representing or aiding an unauthorized insurer.
14. Section 655.50, relating to reports of currency transactions, when such violation is punishable as a felony.
15. Chapter 687, relating to interest and usurious practices.
16. Section 721.08, s. 721.09, or s. 721.13, relating to real estate timeshare plans.
17. Chapter 782, relating to homicide.
18. Chapter 784, relating to assault and battery.
19. Chapter 787, relating to kidnapping.
20. Chapter 790, relating to weapons and firearms.
21. Section 796.03, s. 796.04, s. 796.05, or s. 796.07, relating to prostitution.
22. Chapter 806, relating to arson.
23. Section 810.02(2)(c), relating to specified burglary of a dwelling or structure.
24. Chapter 812, relating to theft, robbery, and related crimes.
25. Chapter 815, relating to computer-related crimes.
26. Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes.
27. Chapter 825, relating to abuse, neglect, or exploitation of an elderly person or disabled adult.

§ 6.9

DRUG OFFENSES

6–263

28. Section 827.071, relating to commercial sexual exploitation of children.
29. Chapter 831, relating to forgery and counterfeiting.
30. Chapter 832, relating to issuance of worthless checks and drafts.
31. Section 836.05, relating to extortion.
32. Chapter 837, relating to perjury.
33. Chapter 838, relating to bribery and misuse of public office.
34. Chapter 843, relating to obstruction of justice.
35. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.
36. Section 849.09, s. 849.14, s. 849.15, s. 849.23, or s. 849.25, relating to gambling.
37. Chapter 874, relating to criminal street gangs.
38. Chapter 893, relating to drug abuse prevention and control.
39. Chapter 896, relating to offenses related to financial transactions.
40. Sections 914.22 and 914.23, relating to tampering with a witness, victim, or informant, and retaliation against a witness, victim, or informant.
41. Sections 918.12 and 918.13, relating to tampering with jurors and evidence.

(b) Any conduct defined as “racketeering activity” under 18 U.S.C. s. 1961(1).

(2) “Unlawful debt” means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted:

(a) In violation of any one of the following provisions of law:

1. Section 550.235, s. 550.3551, or s. 550.3605, relating to dogracing and horseracing.
2. Chapter 550, relating to jai alai frontons.
3. Chapter 687, relating to interest and usury.
4. Section 849.09, s. 849.14, s. 849.15, s. 849.23, or s. 849.25, relating to gambling.

(b) In gambling activity in violation of federal law or in the business of lending money at a rate usurious under state or federal law.

(3) “Enterprise” means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities. A criminal street gang, as defined in s. 874.03, constitutes an enterprise.

(4) “Pattern of racketeering activity” means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.

(5) “Documentary material” means any book, paper, document, writing, drawing, graph, chart, photograph, phonorecord, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into usable form, or other tangible item.

(6) “RICO lien notice” means the notice described in s. 895.05(12) or in s. 895.07.

§ 6.9

DRUG OFFENSES

6–265

(7) “Investigative agency” means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

(8) “Beneficial interest” means any of the following:

(a) The interest of a person as a beneficiary under a trust established pursuant to s. 689.07 or s. 689.071 in which the trustee for the trust holds legal or record title to real property;

(b) The interest of a person as a beneficiary under any other trust arrangement pursuant to which a trustee holds legal or record title to real property for the benefit of such person; or

(c) The interest of a person under any other form of express fiduciary arrangement pursuant to which any other person holds legal or record title to real property for the benefit of such person. The term “beneficial interest” does not include the interest of a stockholder in a corporation or the interest of a partner in either a general partnership or a limited partnership. A beneficial interest shall be deemed to be located where the real property owned by the trustee is located.

(9) “Real property” means any real property or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property.

(10) “Trustee” means any of the following:

(a) Any person acting as trustee pursuant to a trust established under s. 689.07 or s. 689.071 in which the trustee holds legal or record title to real property.

(b) Any person who holds legal or record title to real property in which any other person has a beneficial interest.

(c) Any successor trustee or trustees to any or all of the foregoing persons.

However, the term “trustee” does not include any person appointed or acting as a personal representative as defined in s. 731.201(25) or appointed or acting as a trustee of any testamentary trust or as a trustee of any indenture of trust under which any bonds have been or are to be issued.

(11) “Criminal proceeding” means any criminal proceeding commenced by an investigative agency under s. 895.03 or any other provision of the Florida RICO Act.

(12) “Civil proceeding” means any civil proceeding commenced by an investigative agency under s. 895.05 or any other provision of the Florida RICO Act.

History.—s. 2, ch. 77-334; s. 3, ch. 79-218; s. 300, ch. 79-400; s. 1, ch. 81-141; s. 1, ch. 83-65; s. 25, ch. 83-264; s. 2, ch. 84-9; s. 5, ch. 86-277; s. 1, ch. 87-139; s. 5, ch. 89-143; s. 2, ch. 90-246; s. 3, ch. 90-301; s. 13, ch. 91-33; s. 72, ch. 91-282; s. 4, ch. 92-125; s. 4, ch. 92-281; s. 65, ch. 92-348; s. 2, ch. 93-227; s. 106, ch. 93-415; s. 78, ch. 94-209; s. 91, ch. 95-211; s. 9, ch. 95-340; s. 107, ch. 96-175; s. 7, ch. 96-252; s. 5, ch. 96-260; s. 4, ch. 96-280; s. 7, ch. 96-387; s. 43, ch. 96-388; s. 2, ch. 97-78; s. 2, ch. 99-335; s. 17, ch. 2000-360.

Note.—Former s. 943.461.

895.03 Prohibited activities and defense.

(1) It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

895.04 Criminal penalties and alternative fine.

(1) Any person convicted of engaging in activity in violation of the provisions of s. 895.03 is guilty of a felony of the first degree and shall be punished as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) In lieu of a fine otherwise authorized by law, any person convicted of engaging in conduct in violation of the provisions of s. 895.03, through which he or she derived pecuniary value, or by which he or she caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed 3 times the gross value gained or 3 times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred.

§ 6.9

DRUG OFFENSES

6–267

(3) The court shall hold a hearing to determine the amount of the fine authorized by subsection (2).

(4) For the purposes of subsection (2), “pecuniary value” means:

(a) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else the primary significance of which is economic advantage; or

(b) Any other property or service that has a value in excess of \$100.

History.—s. 4, ch. 77-334; s. 1446, ch. 97-102.

Note.—Former s. 943.463.

895.05 Civil Remedies.—

(1) Any Circuit Court may, after making due provision for the rights of innocent persons, enjoin violations of the provisions of s. 895.03 by issuing appropriate orders and judgments, including, but not limited to:

(a) Ordering any defendant to divest himself or herself of any interest in any enterprise, including real property.

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which the defendant was engaged in violation of the provisions of s. 895.03.

(c) Ordering the dissolution or reorganization of any enterprise.

(d) Ordering the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state.

(e) Ordering the forfeiture of the charter of a corporation organized under the laws of the state, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation has authorized or engaged in

conduct in violation of s. 895.03 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

(2)(a) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of a provision of ss. 895.01–895.05 is subject to civil forfeiture to the state.

(b) Upon the entry of a final judgment of forfeiture in favor of the state, the title of the state to the forfeited property shall relate back:

1. In the case of real property or a beneficial interest, to the date of filing of the RICO lien notice in the official records of the county where the real property or beneficial trust is located; if no RICO lien notice is filed, then to the date of the filing of any notice of *lis pendens* under s. 895.07(5)(a) in the official records of the county where the real property or beneficial interest is located; and if no RICO lien notice or notice of *lis pendens* is filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located.

2. In the case of personal property, to the date the personal property was seized by the investigating agency.

If property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice or after the filing of a civil proceeding or criminal proceeding, whichever is earlier, the investigative agency may, on behalf of the state, institute an action in any circuit court against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding, and the court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding or criminal proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the investigative agency in the action. If a civil proceeding is pending, such action shall be filed only in the court where the civil proceeding is pending.

§ 6.9

DRUG OFFENSES

6-269

(c) The state shall dispose of all forfeited property as soon as commercially feasible. If property is not exercisable or transferable for value by the state, it shall expire. All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. The proceeds realized from such forfeiture and disposition shall be promptly distributed in accordance with the provisions of s. 895.09.

(3) Property subject to forfeiture under this section may be seized by a law enforcement officer upon court process. Seizure without process may be made if:

(a) The seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant.

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding based upon this section.

(4) In the event of a seizure under subsection (3), a forfeiture proceeding shall be instituted promptly. Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement officer making the seizure, subject only to the order of the court. When property is seized under this section, pending forfeiture and final disposition, the law enforcement officer may:

(a) Place the property under seal.

(b) Remove the property to a place designated by court.

(c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(5) The Department of Legal Affairs, any state attorney, or any state agency having jurisdiction over conduct in violation of a provision of this act may institute civil proceedings under this section. In any action brought under this section, the circuit court shall proceed as soon as practicable to the hearing and determination. Pending final determination, the circuit court may at any time enter such injunctions, prohibitions, or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.

(6) Any aggrieved person may institute a proceeding under subsection (1). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(7) The state, including any of its agencies, instrumentalities, subdivisions, or municipalities, if it proves by clear and convincing evidence that it has been injured by reason of any violation of the provisions of s. 895.03, shall have a cause of action for threefold the actual damages sustained and shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation, reasonably incurred. In no event shall punitive damages be awarded. The defendant shall be entitled to recover reasonable attorneys' fees and court costs upon a finding that the claimant raised a claim which was without substantial factual or legal support.

(a) Either party may demand a trial by jury in any civil action brought pursuant to this subsection.

(b) Any prevailing plaintiff under this subsection or s. 772.04 shall have a right or claim to forfeited property or to proceeds derived therefrom superior to any right or claim the state has in the same property or proceedings.

²(8) A final judgment or decree rendered in favor of the state in any criminal proceeding under this act or any other criminal proceeding under state law shall estop the defendant in any subsequent civil action or proceeding under this act or under s. 772.104 as to all matters as to which such judgment or decree would be an estoppel as between the parties.

(9) The Department of Legal Affairs may, upon timely application, intervene in any civil action or proceeding brought under subsection (6) or subsection (7) if it certifies that, in its opinion, the action or proceeding is of general public importance. In such

§ 6.9

DRUG OFFENSES

6-271

action or proceeding, the state shall be entitled to the same relief as if the Department of Legal Affairs had instituted the action or proceeding.

(10) Notwithstanding any other provision of law, a criminal or civil action or proceeding under this act may be commenced at any time within 5 years after the conduct in violation of a provision of this act terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent, or restrain any violation of the provisions of this act, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsection (6) or subsection (7) which is based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding shall be suspended during the pendency of such prosecution, action, or proceeding and for 2 years following its termination.

(11) The application of one civil remedy under any provision of this act shall not preclude the application of any other remedy, civil or criminal, under this act or any other provision of law. Civil remedies under this act are supplemental, and not mutually exclusive.

(12)(a) In addition to the authority to file a RICO lien notice set forth in s. 895.07(1), the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney may apply ex parte to a criminal division of a circuit court and, upon petition supported by sworn affidavit, obtain an order authorizing the filing of a RICO lien notice against real property upon a showing of probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.05. If the lien notice authorization is granted, the department shall, after filing the lien notice, forthwith provide notice to the owner of the property by one of the following methods:

1. By serving the notice in the manner provided by law for the service of process.

6-272

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.9

2. By mailing the notice, postage prepaid, by registered or certified mail to the person to be served at his or her last known address and evidence of the delivery.

3. If neither of the foregoing can be accomplished, by posting the notice on the premises.

(b) The owner of the property may move the court to discharge the lien, and such motorist shall be set for hearing at the earliest possible time.

(c) The court shall discharge the lien if it finds that there is no probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.05 or if it finds that the owner of the property neither knew nor reasonably should have known that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.05.

(d) No testimony presented by the owner of the property at the hearing is admissible against him in any criminal proceeding except in a criminal prosecution for perjury or false statement, nor shall such testimony constitute a waiver of the owner's constitutional right against self-incrimination.

(e) A lien notice secured under the provisions of this subsection is valid for a period of 90 days from the date the court granted authorization, which period may be extended for an additional 90 days by the court for good cause shown, unless a civil proceeding is instituted under this section and a lien notice is filed under s. 895.07, in which event the term of the lien notice is governed by s. 895.08.

(f) The filing of a lien notice, whether or not subsequently discharged or otherwise lifted, shall constitute notice to the owner and knowledge by the owner that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01–895.35, such that lack of such notice and knowledge shall not be

§ 6.9

DRUG OFFENSES

6-273

a defense in any subsequent civil or criminal proceeding under this chapter.

History.—s.5, ch. 77-334; s. 301, ch. 79-400; s. 2, ch. 81-141; s. 1, ch. 84-3 8; s. 5, ch. 84-249; s. 6, ch. 86-277; s. 3, ch. 87-139; s. 5, ch. 90-269; s. 76, ch. 95-211; s. 1447, ch. 97-102.

Note.—Former s. 943.464.

895.06 Civil investigative subpoenas.—

(1) As used in this section, the term “investigative agency.” means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney.

(2) If, pursuant to the civil enforcement provisions of s. 895.05, an investigative agency has reason to believe that a person or other enterprise has engaged in, or is engaging in, activity in violation of this act, the investigative agency may administer oaths or affirmations, subpoena witnesses or material, and collect evidence.

(3) The investigative agency may apply ex parte to the circuit court for the circuit in which a subpoenaed person or entity resides, is found, or transacts business for an order directing that the subpoenaed person or entity not disclose the existence of the subpoena to any other person or entity except the subpoenaed person’s attorney for a period of 90 days, which time may be extended by the court for good cause shown by the investigative agency. The order shall be served with the subpoena, and the subpoena shall include a reference to the order and a notice to the recipient of the subpoena that disclosure of the existence of the subpoena to any other person or entity in violation of the order may subject the subpoenaed person or entity to punishment for contempt of court. Such an order may be granted by the court only upon a showing:

(a) Of sufficient factual grounds to reasonably indicate a violation of ss. 895.01–895.06;

(b) (b) That the documents or testimony sought appear reasonably calculated to lead to the discovery of admissible evidence; and

(c) Of facts which reasonably indicate that disclosure of the subpoena would hamper or impede the investigation or would result in a flight from prosecution.

(4) If matter that the investigative agency seeks to obtain by the subpoena is located outside the state, the person or enterprise subpoenaed may make such matter available to the investigative agency or its representative for examination at the place where such matter is located. The investigative agency may designate representatives, including officials of the jurisdiction in which the matter is located, to inspect the matter on its behalf and may respond to similar requests from officials of other jurisdictions.

(5) Upon failure of a person or enterprise, without lawful excuse, to obey a subpoena issued under this section or a subpoena issued in the course of a civil proceeding instituted pursuant to s. 895.05, and after reasonable notice to such person or enterprise, the investigative agency may apply to the circuit court in which such civil proceeding is pending or, if no civil proceeding is pending, to the circuit court for the judicial circuit in which such person or enterprise resides, is found, or transacts business for an order compelling compliance. Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or material after asserting a privilege against self-incrimination to which he is entitled by law shall not have the testimony or material so provided, or evidence derived therefrom, received against him in any criminal investigation or proceeding.

(6) A person who fails to obey a court order entered pursuant to this section may be punished for contempt of court.

History.—s. 1, ch. 79-218; s. 2, ch. 84-38; s. 4, ch. 87-139; s. 20, ch. 88-381; s. 1448, ch. 97-102.

Note.—Former s. 943.465.

895.07 RICO lien notice.—

(1) Upon the institution of any civil proceeding, the investigative agency, then or at any time during the pendency of the proceeding, may file a RICO lien notice in the official records of any one or more counties. No filing fee or other charge shall be required as a condition for filing the RICO lien notice, and the clerk of the circuit court shall, upon the presentation of a RICO lien notice, immediately record it in the official records.

(2) The RICO lien notice shall be signed by the head of the Department of Legal Affairs or his or her designee or by a state

§ 6.9

DRUG OFFENSES

6-275

attorney or his designee. The notice shall be in such form as the Attorney General prescribes and shall set forth the following information:

(a) The name of the person against whom the civil proceeding has been brought. In its discretion, the investigative agency may also name in the RICO lien notice any other aliases, names, or fictitious names under which the person may be known and any corporation, partnership, or other entity that is either controlled or entirely owned by the person.

(b) If known to the investigative agency, the present residence and business addresses of the person named in the RICO lien notice and of the other names set forth in the RICO lien notice.

(c) A reference to the civil proceeding, stating: that a proceeding under the Florida RICO Act has been brought against the person named in the RICO lien notice; the name of the county or counties in which the proceeding has been brought; land, if known to the investigative agency at the time of filing the RICO lien notice, the case number of the proceeding.

(d) A statement that the notice is being filed pursuant to the Florida RICO Act.

(e) The name and address of the investigative agency filing the RICO lien notice and the name of the individual signing the RICO notice.

A RICO lien notice shall apply only to one person and, to the extent applicable, any other aliases, names, or fictitious names, including names of corporations, partnerships, or other entities, to the extent permitted in paragraph (a). A separate RICO lien notice shall be filed for each person against whom the investigative agency desires to file a RICO lien notice under this section.

(3) The investigative agency shall, as soon as practicable after the filing of each RICO lien notice, furnish to the person named in the notice either a copy of the recorded notice or a copy of the notice with a notation thereon of the county or counties in which the notice has been recorded. The failure of the investigative agency to furnish a copy of the notice under this subsection shall not invalidate or otherwise affect the notice.

(4) The filing of a RICO lien notice creates, from the time of its filing, a lien in favor of the state on the following property of the person named in the notice and against any other names set forth in the notice:

(a) Any real property situated in the county where the notice is filed then or thereafter owned by the person or under any of the names; and

(b) Any beneficial interest situated in the county where the notice is filed then or thereafter owned by the person or under any of the names.

The lien shall commence and attach as of the time of filing of the RICO lien notice and shall continue thereafter until expiration, termination, or release of the notice pursuant to s. 895.08. The lien created in favor of the state shall be superior and prior to the interest of any other person in the real property or beneficial interest if the interest is acquired subsequent to the filing of the notice.

(5) In conjunction with any civil proceeding:

(a) The investigative agency may file without prior court order in any county a *lis pendens* under the provisions of s. 48.23; in such case, any person acquiring an interest in the subject real property or beneficial interest, if the real property or beneficial interest is acquired subsequent to the filing of *lis pendens*, shall take the interest subject to the civil proceeding and any subsequent judgment of forfeiture.

(b) If a RICO lien notice has been filed, the investigative agency may name as a defendant, in addition to the person named in the notice, any person acquiring an interest in the real property or beneficial interest subsequent to the filing of the notice. If a judgment of forfeiture is entered in the proceeding in favor of the state, the interest of any person in the property that was acquired subsequent to the filing of the notice shall be subject to the notice and judgment of forfeiture.

(6) A trustee who acquires actual knowledge that a RICO lien notice or a civil proceeding or criminal proceeding has been filed against any person for whom he holds legal or record title to real

§ 6.9

DRUG OFFENSES

6-277

property shall immediately furnish to the investigative agency the following:

- (a) The name and address of the person, as known to the trustee.
- (b) The name and address, as known to the trustee, of each other person for whose benefit the trustee holds title to the real property.
- (c) If requested by the investigative agency, a copy of the trust agreement or other instrument pursuant to which the trustee holds legal or record title to the real property

Any trustee who fails to comply with the provisions of this subsection is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, or s. 775.083.

(7) Any trustee who conveys title to real property for which, at the time of the conveyance, a RICO lien notice naming a person who, to the actual knowledge of the trustee, holds a beneficial interest in the trust has been filed in the county where the real property is situated is liable to the state for the greatest of:

- (a) The amount of proceeds received directly by the person named in the RICO lien notice as a result of the conveyance;
- (b) The amount of proceeds received by the trustee as a result of the conveyance and distributed to the person named in the RICO lien notice; or
- (c) The fair market value of the interest of the person named in the RICO lien notice in the real property so conveyed; however, if the trustee conveys the real property and holds the proceeds that would otherwise be paid or distributed to the beneficiary or at the direction of the beneficiary or his or her designee, the trustee's liability shall not exceed the amount of the proceeds so held for so long as the proceeds are held by the trustee.

(8) The filing of a RICO lien notice shall not constitute a lien on the record title to real property as owned by the trustee except to the extent that the trustee is named in the RICO lien notice. The investigative agency may bring a civil proceeding in any circuit court

against the trustee to recover from the trustee the amount set forth in subsection (7), and the state shall also be entitled to recover investigative costs and attorney's fees incurred by the investigative agency.

(9) The filing of a RICO lien notice shall not affect the use to which real property or a beneficial interest owned by the person named in the RICO lien notice may be put or the right of the person to receive any avails, rents, or other proceeds resulting from the use and ownership, but not the sale, of the property until a judgment of forfeiture is entered.

(10)(a) The provisions of this section shall not apply to any conveyance by a trustee pursuant to a court order, unless such court order is entered in an action between the trustee and the beneficiary.

(b) Unless the trustee has actual knowledge that a person owning a beneficial interest in the trust is named in a RICO lien notice or is otherwise a defendant in a civil proceeding, the provisions of this section shall not apply to:

1. Any conveyance by the trustee required under the terms of the trust agreement, which trust agreement is a matter of public record prior to the filing of the RICO lien notice; or
2. Any conveyance by the trustee to all of the persons who own beneficial interests in the trust.

(11) All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons.

History.—s. 3, ch. 81-141 s.170, ch. 83-216 s. 224, ch. 91-224; s. 1449, ch. 97-102.

895.08 Term of RICO lien notice.—

(1) The term of a RICO lien notice shall be for a period of 6 years from the date of filing, unless a renewal RICO lien notice has been filed by the investigative agency; in such case, the term of the renewal RICO lien notice shall be for a period of 6 years from the date of its filing. The investigative agency shall be entitled to only one renewal of the RICO lien notice.

§ 6.9

DRUG OFFENSES

6-279

(2) The investigative agency filing a RICO lien notice may release in whole or in part the RICO lien notice or may release any specific real property or beneficial interest from the RICO lien notice upon such terms and conditions as it may determine. A release of a RICO lien notice executed by the investigative agency may be filed in the official records of any county. No charge or fee shall be imposed for the filing of a release of a RICO lien notice.

(3) If no civil proceeding has been instituted by the investigative agency seeking a forfeiture of any property owned by the person named in the RICO lien notice, the acquittal in the criminal proceeding of the person named in the RICO lien notice or the dismissal of the criminal proceeding shall terminate the RICO lien notice and, in such case, the filing of the RICO lien notice shall have no effect. In the event the criminal proceeding has been dismissed or the person named in the RICO lien notice has been acquitted in the criminal proceeding, the RICO lien notice shall continue for the duration of the civil proceeding.

(4) If no civil proceeding is then pending against the person named in a RICO lien notice, the person named in the RICO lien notice may institute an action in the county where the notice has been filed against the investigative agency that filed the notice seeking a release or extinguishment of the notice. In such case:

(a) The court shall, upon the motion of such person, immediately enter an order setting a date for hearing, which date shall be not less than 5 or more than 10 days after the suit has been filed, and the order along with a copy of the complaint shall be served on the investigative agency within 3 days after the institution of the suit. At the hearing, the court shall take evidence on the issue of whether any real property or beneficial interest owned by such person is covered by the RICO lien notice or is otherwise subject to forfeiture under the Florida RICO Act; if such person shows by a preponderance of the evidence that the RICO lien notice is not applicable to him or that any real property or beneficial interest owned by him is not subject to forfeiture under the Florida RICO Act, the court shall enter a judgment extinguishing the RICO lien notice or releasing the real property or beneficial interest from the RICO lien notice.

6-280

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.9

(b) The court shall immediately enter its order releasing from the RICO lien notice any specific real property or beneficial interest if a sale of such real property or beneficial interest is pending and the filing of the notice prevents the sale of the property or interest. However, the proceeds resulting from the sale of such real property or beneficial interest shall be deposited into the registry of court, subject to the further order of the court.

(c) At the hearing set forth in paragraph (a), the Court may release any real property or beneficial interest from the RICO lien notice, upon the posting by such person of such security as is equal to the value of the real property or beneficial interest owned by such person.

(5) In the event a civil proceeding is pending against a person named in a RICO lien notice, the court upon motion by such person may grant the relief set forth herein.

History. s. 4, ch. 81-141; s. 1450, ch. 97-102.

895.09 Disposition of funds obtained through forfeiture proceedings.

(1) A court entering a judgment of forfeiture in a proceeding brought pursuant to s. 895.05 shall retain jurisdiction to direct the distribution of any cash or of any cash proceeds realized from the forfeiture and disposition of the property. The court shall direct the distribution of the funds in the following order of priority:

(a) Any statutory fees to which the clerk of the court may be entitled.

(b) Any claims against the property by persons who have previously been judicially determined to be innocent persons, pursuant to the provisions of s. 895.05(2)(c), and whose interests are preserved from forfeiture by the court and not otherwise satisfied. Such claims may include any claim by a person appointed by the court as receiver pending litigation.

(c) Any claim by the Board of Trustees of the Internal Improvement Trust Fund on behalf of the Forfeited Property Trust Fund or the Land Acquisition Trust Fund pursuant to s.

§ 6.9

DRUG OFFENSES

6-281

253.03(13), not including administrative costs of the Department of Environmental Protection previously paid directly from the Forfeited Property Trust Fund in accordance with legislative appropriation.

(2)(a) Following satisfaction of all valid claims under subsection (1), 25 percent of the remainder of the funds obtained in the forfeiture proceedings pursuant to s. 895.05 shall be deposited as provided in paragraph (b) into the appropriate trust fund of the Department of Legal Affairs or state attorney's office which filed the civil forfeiture action; 25 percent shall be deposited as provided in paragraph (c) into the law enforcement trust fund of the investigating law enforcement agency conducting the investigation which resulted in or significantly contributed to the forfeiture of the property; 25 percent shall be deposited as provided in paragraph (d) in the Substance Abuse Trust Fund of the Department of Children and Family Services, and the remaining 25 percent shall be deposited in the Forfeited Property Trust Fund of the Department of Environmental Protection. When a forfeiture action is filed by the Department of Legal Affairs or a state attorney, the court entering the judgment of forfeiture shall, taking into account the overall effort and contribution to the investigation and forfeiture action by the agencies that filed the action, make a pro rata apportionment among such agencies of the funds available for distribution to the agencies filing the action as provided in this section. If multiple investigating law enforcement agencies have contributed to the forfeiture of the property, the court which entered the judgment of forfeiture shall, take into account the overall effort and contribution of the agencies to the investigation and forfeiture action, make a pro rata apportionment among such investigating law enforcement agencies of the funds available for distribution to the investigating agencies as provided in this section.

(b) If a forfeiture action is filed by the Attorney General, any funds obtained by the Department of Legal Affairs by reason of paragraph (a) shall be deposited in the Legal Affairs Revolving Trust Fund as established by s. 16.53 and may be expended for the purposes and in the manner authorized in that section. If a forfeiture action is filed by a state attorney, any funds obtained

by the state attorney's office by reason of paragraph (a) shall be deposited in the State Attorney RICO Trust Fund as established by s. 27.345 and may be expended for the purposes and in the manner authorized in that section. In addition, any funds that are distributed pursuant to this section to an agency filing a forfeiture action may be used to pay the costs of investigations of violations of this chapter and the criminal prosecutions and civil actions related thereto. Such costs may include all taxable costs; costs of protecting, maintaining, and forfeiting the property; employees' base salaries and compensation for overtime; and such other costs as are directly attributable to the investigation, prosecution, or civil action.

(c) Any funds distributed to an investigating law enforcement agency under paragraph (a) shall be deposited in the special law enforcement trust fund established for that agency pursuant to s. 932.7055 and expended for the purposes and in the manner authorized in that section. In addition, any funds distributed to an investigating law enforcement agency pursuant to this section may be used to pay the costs of investigations of violations of this chapter and the criminal prosecutions and civil actions related thereto, pursuant to ¹s. 932.704 (3). Such costs may include all taxable costs; costs of protesting, maintaining, and forfeiting the property; employees' base salaries and compensation for overtime; and such other costs directly attributable to the investigation, prosecution, or civil action.

(d) The Department of Children and Family Services shall, in accordance with chapter 397, distribute funds obtained by it pursuant to paragraph (a) to public and private nonprofit organizations licensed by the department to provide substance abuse treatment and rehabilitation centers or substance abuse prevention and youth orientation programs in the service district in which the final order of forfeiture is entered by the court.

(e) On a quarterly basis, any excess funds, including interest, over \$1 million deposited in the Forfeited Property Trust Fund of the Department of Environmental Protection in accordance with paragraph (a) shall be deposited in the Substance Abuse Trust Fund of the Department of Children and Family Services.

§ 6.10[A]

DRUG OFFENSES

6–283

(3) Nothing in this section shall be construed to limit the authority of an entity that files a forfeiture action to compromise a claim for forfeiture; however, any proceeds arising from a compromise or from the sale of property obtained in a compromise shall be distributed in the manner provided in subsections (1) and (2).

(4) Pending the final distribution of the cash or cash proceeds pursuant to this section, the court may authorize the cash or cash proceeds to be deposited in the court registry or in a qualified public depository.

(5) For purposes of this section, the term “cash or cash proceeds” includes, but is not limited to, damages or penalties or any other monetary payment, the monetary proceeds from property forfeited to the state pursuant to s. 895.05, or any payment made by any defendant by reason of any decree or settlement in any action filed pursuant to s. 895.05.

History. s. 1, ch. 84-249; s. 2, ch. 85-306; s. 7, ch. 86-277; s. 21, ch. 88-381; ss. 1, 6, ch. 89-102; ss. 8, 9, ch. 92-54; s. 41, ch. 93-39; s. 16, ch. 94-316; s. 478, ch. 94-356; s. 2, ch. 98-389; s. 306, ch. 99-8.

§ 6.10. FORGED PRESCRIPTIONS

A. **Scienter**

It has been held that an information charging that the accused unlawfully uttered a false and forged prescription for narcotic drugs would be subject to dismissal since it must be alleged and shown that the instrument was forged, that the defendant knew the instrument was false and forged and that it was uttered with the intent to injure or defraud another.¹⁶⁶ On the other hand, in a prosecution under the old statute prohibiting the procurement of such prescription “by fraud, deceit, misrepresentation, or subterfuge”; it has been held that knowledge or scienter is implicit in the language of the statute and therefore it does not have to be separately or specifically alleged.¹⁶⁷

¹⁶⁶ *Beasley v. State*, 158 Fla. 824, 30 So. 2d 379 (1947).

¹⁶⁷ *State v. Scarborough*, 170 So. 2d 458 (Fla. 2d DCA 1965).

B. Problems of Proof

In one case, involving a false impersonation for the purpose of obtaining a controlled substance, the state obtained a conviction on the basis that the defendant presented a prescription signed by physician licensed to practice in Florida, but listed by the State Board of Medical Examiners as living in Connecticut. There was no showing that the signature was in fact forged nor that the physician had not been in Florida, nor that the prescription had not been sent from Connecticut. On these facts the court held there was insufficient evidence for the prosecution.¹⁶⁸ The burden of proof presented by these facts is significant for defense counsel. Of course, it is obvious that the state need not prove that no physician, of all the physicians in Florida, could have prescribed the narcotic in question,¹⁶⁹ where the facts do not show a particular physician's name.

From the defense point of view, it should be remembered that regardless of whether the state must allege the knowledge of the defendant or whether the knowledge factor is implicit in the charge, it is nonetheless an element to be shown by the state. So, where one passes a forged prescription in good faith, entirely innocent of the fact that it is a forgery, there could be no finding of the scienter element, and, therefore, no conviction for uttering a forged instrument. In other words, the state must demonstrate more than the mere uttering of an instrument which is shown to be forged.¹⁷⁰ In that same regard, where the pharmacist does not have any independent recollection concerning the identity of the defendant and therefore, cannot say with certainty that it was the defendant who delivered the false prescription to him, the case cannot go to the jury.¹⁷¹

Similarly, the First District Court of Appeal held that where there was no moral turpitude involved, and a dentist used his assistant's name on prescriptions merely to skirt rules, intending to only use the drugs to treat patients, there was no felony violation of the drug laws.¹⁷² The court stated that due to this lack of intent the maximum punishment allowed would be a public reprimand and a thirty day license suspension.

In a prosecution under the old statute, the question was raised, but not answered, as to whether the giving of a false address requires scienter as

¹⁶⁸ Rollins v. State, 211 So. 2d 861 (Fla. 3d DCA 1968).

¹⁶⁹ Chavez v. State, 215 So. 2d 750 (Fla. 2d DCA 1968).

¹⁷⁰ State v. Scarborough, 170 So. 2d 458 (Fla. 2d DCA 1965).

¹⁷¹ Beasley v. State, 158 Fla. 824, 30 So. 2d 379 (1974).

¹⁷² Richardson v. State Bd. of Dentistry, 326 So. 2d 231 (Fla. 1st DCA 1976).

an element.¹⁷³ It was held, however, that the giving of an address where the defendant did not live and never had lived, together with other testimony, established the fact that the defendant gave a false address knowingly.¹⁷⁴

C. Good Faith

Section 893.05 requires that a physician prescribe restricted drugs only in good faith and only in the course of his professional practice.¹⁷⁵ Where one of these requisites is lacking, the prescribing of drugs constitutes a “delivery” prohibited by FLA. STAT. § 893.02(5).¹⁷⁶

The Second District Court of Appeal has also held that the requirements of prescribing drugs in good faith and only in the course of one’s professional practice are exceptions to the prohibitions of FLA. STAT. § 893.13, and not separate offenses.¹⁷⁷ As exceptions, the state need not negate them in an indictment or information,¹⁷⁸ and the defendant has the burden of proving them.¹⁷⁹

D. Administrative Searches and Seizures

The Supreme Court of Florida has held that warrantless administrative searches and seizures are limited to aiding in the enforcement of regulations that are administrative in nature. There is no authority under FLA. STAT. § 465.131 for warrantless searches and seizures in aid of a prosecution on criminal drug charges.¹⁸⁰

¹⁷³ Kleinbard v. State, 208 So. 2d 127 (Fla. 3d DCA 1968).

¹⁷⁴ See Reis v. State, 248 So. 2d 666 (Fla. 3d DCA 1971) where defendant used a hotel address but was not registered at the hotel.

¹⁷⁵ See State v. Weeks, 335 So. 2d 274 (Fla. 1976) where the Supreme Court upheld the statutes as not unconstitutionally vague. The court stated that this statute need give an understandable notice of the type of conduct required only to members of the medical profession. Cf. Cohn v. Department of Prof. Reg., 477 So. 2d 1039, 1045 (Fla. 3d DCA 1985) (notwithstanding the fact that a pharmacist complied with all applicable statutes, he may nonetheless have acted in bad faith).

¹⁷⁶ State v. Vinson, 320 So. 2d 50 (Fla. 2d DCA 1975). See also Forlaw v. Fitzer, 456 So. 2d 432, 434 (Fla. 1984).

¹⁷⁷ King v. State, 336 So. 2d 1200 (Fla. 2d DCA 1976).

¹⁷⁸ King v. State, 336 So. 2d 1200 (Fla. 2d DCA 1976).

¹⁷⁹ See generally Purifoy v. State, 359 So. 2d 446 (Fla. 1978).

¹⁸⁰ Olson v. State, 287 So. 2d 313 (Fla. 1973); see also FLA. STAT. §§ 465.011, 18, 22(1).

6-286 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.10[E]

E. Miscellaneous

Attention is called to FLA. STAT. § 831.30 for a misdemeanor provision relating to the fraudulent obtaining of medicinal drugs.

It is also important to note that when a physician intentionally issues a bad prescription, he may be convicted under FLA. STAT. § 893.13 for delivering drugs illegally as well. In *Cilento v. State*,^{180a} the Supreme Court of Florida held that such a physician may have violated both FLA. STAT. §§ 893.13(1) and 893.13(2).^{180a1} However, only one conviction may be had for one criminal act.^{180b}

F. Sale of Prescription Drugs Without a Prescription

Section 465.015(2)(c) also prohibits the sale or dispensing of prescription drugs without first being furnished with a prescription. In order to convict an individual under this statute, the state must prove that the drug that was sold or dispensed was a prescription drug.^{180c} However, it is not necessary to prove that the seller was a pharmacist.^{180d} The statute has been construed to apply to anyone who sells or dispenses prescription drugs.

In *Lazarus v. Department of Professional Regulation*,^{180D1} the court upheld the revocation of the pharmacist's license where, in filling many *individually* valid prescriptions, he ultimately distributed excessive and inappropriate quantities of Quaaludes.

§ 6.11. PENALTIES**A-D. [RESERVED FOR FUTURE MATERIAL]¹⁸¹⁻²¹⁵****E. Sentencing Problems**

It is important to note that one may not be imprisoned at hard labor in Florida.²¹⁶

^{180a} *Cilento v. State*, 377 So. 2d 663 (Fla. 1979).

^{180a1} FLA.STAT. § 893, amended in its entirety by the 2000 Legislature.

^{180b} See § XII, dealing with lesser included offenses.

^{180c} *Block v. State*, 437 So. 2d 792 (Fla. 2d DCA 1983).

^{180d} FLA.STAT. § 465.003 (8); *Block v. State*, 437 So. 2d 792 (Fla. 2d DCA 1983).

^{180D1} *Lazarus v. Department of Prof. Reg.*, 481 So. 2d 22 (Fla. 3d DCA 1985).

¹⁸¹⁻²¹⁵ [RESERVED FOR FUTURE MATERIAL]

²¹⁶ *Stierwalt v. State*, 363 So. 2d 146 (Fla. 2d DCA 1978); see also *Jabbour v. State*, 353 So. 2d 202 (Fla. 3d DCA 1978) (where the court held that there exists no Florida statute which provides for imprisonment at hard labor).

§ 6.11[G]

DRUG OFFENSES

6-287

The Third District Court of Appeal has followed one statute which provides that even when a statute states that imprisonment is to be in a state prison, the court may sentence defendant in the county jail if the total of the cumulative sentences is not greater than one year.^{216a}

For other sentencing considerations, including sentencing for multiple offenses, see Davidson, Florida Criminal Sentencing Law (D & S Publishers).

F. Minimum Mandatory Sentences

For a discussion of the application of minimum mandatory sentences to the areas of drug violations see Davidson, “*Fla. Criminal Sentencing Law*,” Ch. 3 (D & S Publishers).

Of special interest in the area of drug violations, however, is FLA. STAT. § 397.12. That statute allows a trial court to sentence a drug defendant to a drug treatment program in lieu of any other sentence.^{216a1} Also, in *Scates v. State*,^{216B} the Supreme Court of Florida held that notwithstanding the fact that the offense of selling drugs within one thousand feet of a school requires a minimum mandatory three year prison sentence, such an offender may nonetheless be sentenced to a drug treatment program instead. This is discussed further *above*, in section IV, F.

Where a defendant is convicted of trafficking in drugs, however, the applicable minimum mandatory sentence must be given unless he rendered substantial assistance to the state.²¹⁷

G. Civil Action

In addition to the criminal penalties mentioned above, Chapter 772 of the Florida Statutes was created in 1986 to provide for civil actions against a person who commits, attempts to commit, or conspires, solicits or intimidates another to commit certain criminal offenses, including drug offenses.^{217A}

^{216a} See *Willner v. State*, 350 So. 2d 1108 (Fla. 3d DCA 1977) following F.S. 922.051; see also *Dade v. Baker*, 265 So. 2d 700 (Fla. 1972).

^{216a1} See Also *Hill v. State*, 624 So. 2d 826 (Fla. 2d DCA 1993).

^{216B} *Scates v. State*, 603 So. 2d 504, 506 (Fla. 1992).

²¹⁷ *State v. Houston*, 605 So. 2d 962 (Fla. 1st DCA 1992).

^{217A} FLA. STAT. § 772.102(1)(a)28.

6-288 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.11[H]

The most interesting points of this chapter are that a clear and convincing evidentiary standard is employed;^{217b} the fact that the defendant was not convicted criminally does not act as an estoppel against the plaintiff;^{217c} attorney's fees are taxed as costs;^{217d} and the damages are threefold the actual damages.^{217e}

H. Revocation of Driver's License

If an individual is found guilty or adjudicated delinquent for any violation of Chapter 893 involving a substance listed in FLA. STAT. § 893.03(1) or (2),^{217f} the court shall revoke his drivers license for up to two years. If such individual has no license, or has already had it suspended, this time period is tacked on before he may receive a license.

History.—s. 3, ch. 88-381.

§ 6.12. LESSER INCLUDED OFFENSES

According to the Supreme Court of Florida²¹⁸ the four categories of lesser included offenses once enunciated in *Brown v. State*²¹⁹ have been reduced to two. These are as follows:

1. Offenses necessarily included in the offense charged, which will include some lesser degrees of offenses.
2. Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence, which will include all attempts and some lesser degrees of offenses.

The above categories were essentially prior categories three and four under *Brown*.

^{217b} FLA. STAT § 772.104.

^{217c} FLA. STAT § 772.15.

^{217d} FLA. STAT § 772.185.

^{217e} FLA. STAT § 772.104.

^{217f} This statute is located *above* § II.

²¹⁸ In the Matter of the Use By the Trial Courts of the Standard Jury Instructions In Criminal Cases, 431 So. 2d 594 (Fla. 1981).

²¹⁹ *Brown v. State*, 206 So. 2d 377 (Fla. 1968).

A. Offenses Necessarily Included in the Offense Charged, Which Will Include Some Lesser Degrees of Offenses.

An offense which is necessarily included in the major offense is also a lesser included offense. The test for determining this is very simple. If the major offense cannot be proved without proving the minor offense, the minor offense is a lesser included one.²²⁰

An example of a category three lesser included offense is found in *Purvis v. State*.²²¹ There, the court held that possession is a lesser offense of possession of one hundred pounds of marijuana.

It would appear that simple possession of marijuana is a necessarily lesser included offense of bringing marijuana into a correctional institution under FLA. STAT. § 944.47.^{221a} However, in *Connelly v. State, the Supreme Court* held that the double jeopardy clause did not prohibit the defendant from being convicted of both introducing or possessing contraband upon the grounds of a county detention facility and possession of cannabis; prosecution in respect to the first count was solely for the act of introduction, and prosecution on the second count was for the act of simple possession.^{221a1}

It also appears that since the weight of the drugs depends on the evidence of it, possession of “less than 20 grams” of it, which is a misdemeanor, is a category two lesser offense.^{221b} Permissive lesser included offenses, which must also be charged when the pleadings and evidence demonstrate that they are included,^{221c} are discussed in the following section.

²²⁰ *Brown v. State*, 206 So. 2d 377, 381 82 (Fla. 1968)

²²¹ *Purvis v. State*, 370 So. 2d 32 (Fla. 2d DCA 1979). *Compare Parks v. State*, 437 So. 2d 790 (Fla. 2d DCA 1983) (possession of cannabis held not to be a lesser offense of possession with intent to sell since both are third degree felonies). *But see* the Florida Bar Re Standard Jury Instructions, 508 So. 2d 1221, 1233 35 (Fla. 1987).

^{221a} *See Tessier v. State*, 462 So. 2d 123 (Fla. 2d DCA 1985).

^{221a1} *State v. Connelly*, 748 So.2d 248 (Fla. 1999).

^{221b} *See Wilcot v. State*, 509 So. 2d 261, 262 (Fla. 1987).

^{221c} *See Wilcot v. State*, 509 So. 2d 261, 262 (Fla. 1987).

B. Offenses Which May or May Not Be Included in the Offense Charged, Depending on the Accusatory Pleading and the Evidence, Which Will Include All Attempts and Some Lesser Degrees of Offenses.²²²

For a crime to be lesser and included under this category, the accusatory pleading must have alleged all of its elements, and evidence of all of these elements must have been presented at trial.²²³

A problem may be encountered in the area of category two offenses, however, since the Florida courts have held that such an offense is only a “lesser included” one where all of its elements are alleged in the charging document, and where evidence of each is adduced at trial. In the earlier case of *Goswick v. State*,²²⁴ the Florida Supreme Court had held that if the evidence at trial proved the elements of a lesser offense, it could be charged as lesser included even though it was not charged in the accusatory document. However, in 1970, in *State v. Smith*,²²⁵ the court overruled this part of the *Goswick* decision and expressly reaffirmed their opinion in *Brown*. The court explained that it is necessary for the charging document to contain an allegation of any offense for which a defendant may be found guilty. The Florida Constitution²²⁶ requires that this be sufficient to advise a defendant of “the nature of the accusation against him.”

A logical interpretation of category four offenses was presented by the Second District Court of Appeal in *Anderson v. State*.²²⁷ In this case defendant was convicted of aiding and assisting in the conducting of a lottery. The evidence at trial showed that defendant had sold lottery tickets, and defendant requested that the court instruct the jury on the lesser offense of *sale* of lottery tickets. The trial court refused, but the district court reversed, holding that where the lesser offense is *comprehended* within the major offense to the extent that it is within the scope of the charge made, where sufficient evidence of the lesser offense was presented, and where defendant requests the charge, it should be given.

²²² Formerly category four.

²²³ See *Brown v. State*, 206 So. 2d 377 (Fla. 1968). See also *Carruthers v. State*, 636 So. 2d 853, 855 (Fla. 1st DCA 1994) (an instruction on attempted sale of drugs was required).

²²⁴ *Goswick v. State*, 143 So. 2d 817 (Fla. 1962).

²²⁵ *State v. Smith*, 240 So. 2d 807 (Fla. 1970)

²²⁶ Presently contained in FLA. CONST. art. I, § 16.

²²⁷ *Anderson v. State*, 255 So. 2d 550 (Fla. 2d DCA 1971), *overruled*, 270 So. 2d 353 (Fla. 1973).

§ 6.12[B]

DRUG OFFENSES

6–291

The Supreme Court of Florida, however, reversed²²⁸ this decision. The court stated that since defendant was aiding and assisting in the conducting of a lottery, proving he sold tickets was not necessary, since one may aid in a crime in any number of ways. Therefore, the offense of selling was not a category one offense. Also, since the charging document did not allege all of the elements of selling tickets, the offense of selling did not fall under category two. The court again cited the Florida Constitution which provides that a defendant be sufficiently advised of the nature of the accusation against him.

However, since the lesser offense was comprehended within the major offense, the lesser offense was proven by the evidence, and since defendant *himself* requested the charge, the decision of the district court appears to be more reasonable. The constitutional protection of being advised of the nature of an offense is insured by the fact that unless the lesser offense is sufficiently charged, a defendant may not be convicted of it unless he *requests* such a jury charge.

Where a defendant requests that such a lesser offense be charged, and the court erroneously charges the jury to that effect, and the jury finds the defendant guilty of the lesser offense, at least one court has held that the conviction will stand.²²⁹

By holding that an offense is lesser and included within a major offense only where all of the elements of the lesser one are contained in the charging document, this provides that State with a great advantage over an individual defendant. Where the State's case is strong, it may preclude the possibility of the defendant being convicted of a mere lesser offense by failing to charge the elements thereof in the information. But where the State's case is weak, it may decide to allege such elements in the hopes of at least obtaining a conviction of the lesser offense. Since the State has sole control over this tactical decision, it appears that a conviction obtained by the use of this tactic may possibly be attacked in the federal courts as providing an unfair trial. The Second District Court of Appeal's decision in *Anderson*, certainly seems more reasonable.

However, the two main problems existing under the Florida law concerning category two offenses appeared to have been addressed on the Federal

²²⁸ State v. Anderson, 270 So. 2d 353 (Fla. 1973).

²²⁹ Lumia v. State, 372 So. 2d 525 (Fla. 4th DCA 1979), *cert. den.*, 381 So. 2d 767 (Fla. 1980). However, it does not appear that the Anderson decision, *above* was cited to the Lumia court.

6–292 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.12[C]

level. In *Brown v. Ohio*,^{229a} the United States Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment also applies to bar multiple punishments for the same offense.^{229b} As such, the test for determining whether two offenses are “separate” is whether *each* one requires proof of a *fact which the other does not*.^{229c} Therefore, where *either one* of the offenses, either the greater or the lesser, does not require proof of an *additional* element, the lesser offense is included within the major offense charged.

The Florida Legislature has so provided FLA. STAT. § 775.021(4) (a) to provide as follows:

(4) (a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. For a full discussion of the double jeopardy statute, *see* State v. Connelly.^{229d}

C. Exceptions

[1.]—Waiver

The *Brown*^{230b} court held that failing to instruct a jury on a lesser included offense is reversible error. However, the right to such a jury instruction may be *waived* where a defendant fails to require the instruction, and/or fails to properly object to the trial court’s refusal to issue it.²³¹

^{229a} *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). *See also* *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

^{229b} *See also* *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984) (the double jeopardy protection against cumulative punishments is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature).

^{229c} *Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). *See also* footnote 6 of the decision for additional restrictions. This is known as the “Blockburger” test, and is discussed at length *above* in Chapter 5.

^{229d} *State v. Connelly*, 748 So.2d 248 (Fla. 1999).

^{230b} *Brown v. State*, 206 So. 2d 377 (Fla. 1968), *cited most recently*, in *I.T. v. State*, 694 So.2d 720 (Fla. 1997)..

²³¹ *Brown v. State*, 206 So. 2d 377, 383–384 (Fla. 1968).

It is important to note that the court in *Brown* also held that a defendant's request for instructions on lesser included offenses should be in writing, unless it would obviously be fruitless to be so.²³²

[2.]—Offense Is Two-Steps Removed

There is also another situation where a trial court's failure to instruct a jury on a lesser included offense may be considered harmless error. This occurs when the lesser offense is at least two steps removed from the major offense, and the jury actually finds the defendant guilty of the major offense. If there was an instruction given on another lesser offense which was of a higher degree than the one not charged, and the jury still chose to convict on the major offense, the failure to instruct on the offense two steps removed is harmless error.²³³ The reason for this is that if the jury chooses not to exercise its power to grant a "jury pardon" by convicting a defendant of a crime which is one step less severe than the major offense charged, it is presumed they would not consider convicting him of an offense which is two steps less severe.²³⁴

However, the defendant should request instructions on lesser included offenses,²³⁵ and the trial court should so instruct the jury, even if the offenses are two or more steps removed from the major offense. The reason for this is that if the court fails to instruct the jury on a lesser offense which is two steps removed, and the jury decides to convict the defendant of only the next higher lesser included offense, the failure to instruct becomes reversible error.²³⁶ If a jury convicts a defendant of the least severe offense

²³² *Brown v. State*, 206 So. 2d 377, 384 (Fla. 1968).

²³³ See *State v. Abreau*, 363 So. 2d 1063 (Fla. 1978), *reversing*, 347 So. 2d 819 (Fla. 3d DCA 1977), and disapproving in part, *Lomax v. State*, 345 So. 2d 719 (Fla. 1977). *State v. Abreau* has been distinguished in *Overway v. State*, 718 So.2d 308 (5th DCA 1998). *But see State v. Estevez*, 753 So.2d 1 (Fla.1999).

²³⁴ However, there are also arguments to be made in favor of holding that a failure to instruct on any requested lesser included offense should constitute reversible error. For example, being instructed on a crime which is even less severe than another lesser included offense would allow a jury to choose a middle ground, instead of forcing them to choose either the most severe or least severe crime charged. Also, the mere fact that an even less severe crime is instructed on by the judge might influence a jury's thinking.

²³⁵ Unless, of course, the defense feels that the State's case is so weak that the defendant will probably be acquitted. In this case, the defendant may not wish to give the state a chance at getting a conviction on a lesser offense.

²³⁶ See generally *State v. Abreau*, 363 So. 2d 1063,1064 (Fla. 1978).

6-294 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.12[C][2.]

charged, there is no guarantee that they would not have opted for an even lesser offense. Therefore, the trial court interfered with the jury's power of a "jury pardon."

This "two steps removed" doctrine has even been extended by the First District Court of Appeal. In *Henderson v. State*,²³⁷ dealing with assault and battery, the court essentially held that where lesser included offenses are *analogous* to being two steps removed from the offense convicted of, the failure to instruct the jury on these offenses is harmless error.

In this case the defendant was on trial for one count of aggravated battery, and one count of battery, and the trial court failed to instruct the jury on the lesser included offenses of attempted aggravated battery and attempted battery. However, assault and aggravated assault were found to be category four lesser included offenses in this instance, and were thus charged to the jury. This resulted in the jury returning a verdict of guilty on both the battery and the aggravated battery counts.

The court reasoned that since an assault and an attempted battery are both second degree misdemeanors, and since an aggravated assault and an attempted aggravated battery are both third degree misdemeanors, this was analogous to the offenses being two steps removed since the jury pardon concept was still preserved.

Whereas the court was careful to point out that an assault is not the same as an attempted battery, and an aggravated assault is not the same as an attempted aggravated battery, however, it does not appear that the court's decision reflects these distinctions.

Since assaults and aggravated assaults have the additional element of "fear in the victim," it does not seem logical to assume that just because a jury did not find a defendant guilty of these crimes it would not find him guilty of attempted battery or attempted aggravated battery. It may be that the jury's decision hinged on the fact that they did not believe the victim was in fear. Two offenses which are of the same degree of severity, then, are not necessarily identical for this purpose.

If on the other hand, the court in this case had instructed the jury on attempted battery and attempted aggravated battery, and had failed to instruct on assault and aggravated assault, the decision would be more logical. This is so because if the jury had not convicted the defendant of attempt, they more likely than not would not have convicted the defendant

²³⁷ *Henderson v. State*, 370 So. 2d 435 (Fla. 1st DCA 1979).

§ 6.14

DRUG OFFENSES

6–295

of an offense which even has an *additional* element, that being fear in the victim.

However, in *Marshall v. State*,^{237a} the Third District Court of Appeals held that the failure to instruct the jury on a lesser offense which was one step removed from the one convicted of constituted error which was harmful *per se*. The facts that the court had given an instruction on another lesser offense of the same degree as the one requested, and that the jury nonetheless convicted the defendant of a crime which was one degree higher, were of no consequence.

[3.]—Offenses Punished Identically

When an offense carries the same punishment as the major offense charged, it cannot be lesser included therein. For example, in *Parks v. State*,^{237b} the court held that since both possession of cannabis and possession with intent to sell it were third-degree felonies, possession was not lesser and included within the possession with intent to sell offense.

§ 6.13. SEARCH AND SEIZURE

For an explanation of Florida law concerning Search and Seizure, *see above* Chapter Two.

§ 6.14. PROBABLE CAUSE

For an explanation of probable cause, *see above* Chapter One, Section 111, E; and Chapter Two, Section 11, B., *above*.

^{237a} *Marshall v. State*, 529 So. 2d 797 (Fla. 3d DCA 1988), and cases cited therein.

^{237b} *Parks v. State*, 437 So. 2d 790 (Fla. 2d DCA 1983).

6-296 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

§ 6.15. JURY INSTRUCTIONS^{237c}

25.1 SALE OF A SUBSTANCE IN PLACE OF A CONTROLLED SUBSTANCE

§ 817.563, Fla.Stat.

To prove the crime of Sale of a Substance in Place of a Controlled Substance, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) **without legal authority agreed, consented, or offered to sell** (substance prohibited by § 893.03, Fla.Stat.).
2. (Defendant) **did sell a different substance in place of** (substance prohibited by § 893.03, Fla.Stat.).

Definition

“Sell” means the actual transfer or delivery of something to another person in exchange for money or something of value.

Lesser Included Offenses

SALE OF SUBSTANCE IN PLACE OF A CONTROLLED SUBSTANCE — 817.563			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

^{237c} Rule 3.390 of the Fla. Rules of Crim. Proc. provides as follows:

(a) The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial.

§ 6.15

DRUG OFFENSES

6-297

Comment

This instruction was adopted in 1995.

**25.2 DRUG ABUSE — SALE, PURCHASE, MANUFACTURE,
DELIVERY, OR POSSESSION WITH INTENT**

§ 893.13(1)(a), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) **is a controlled substance.**

To prove the crime of (crime charged), **the State must prove the following** (applicable number) **elements beyond a reasonable doubt:**

1. (Defendant)

[sold]
[purchased]
[manufactured]
[delivered]
[possessed with intent to sell]
[possessed with the intent to purchase]
[possessed with intent to manufacture]
[possessed with intent to deliver]

a certain substance.

2. **The substance was** (specific substance alleged).

Give if possession is charged

3. (Defendant) **had knowledge of the presence of the substance.**

Definitions; give as applicable

Sell

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

6-298 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

Manufacture § 893.02(12)(a), Fla.Stat.

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

Deliver § 893.02(5), Fla.Stat.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Possession

To “possess” means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person,
or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the

§ 6.15

DRUG OFFENSES

6-299

person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Lesser Included Offenses

SALE, MANUFACTURE, DELIVERY OR POSSESSION WITH INTENT TO SELL, MANUFACTURE OR DELIVER CONTROLLED SUBSTANCE — 893.13(1)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt, except when delivery is charged	777.04(1)	5.1
	If delivery of cannabis is charged	893.13(3)	
	If possession of cannabis is charged	893.13(6)(b)	
	If possession is charged and offense would be a second degree felony under 893.13(1)(a)1	893.13(6)(a)	

Comment

Note § 893.13(1)(g), Fla.Stat., if the charge involves possession or delivery without consideration of not more than 20 grams of cannabis.

If the defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruction may be required. See State v. Medlin, 273 So.2d 394 (Fla. 1973).

This instruction was adopted in 1981 and amended in 1989 and 1997.

25.3 DRUG ABUSE — SALE, PURCHASE, DELIVERY, OR POSSESSION IN EXCESS OF TEN GRAMS

§ 893.13(1)(b), Fla.Stat.

This instruction will have to be altered if a combination of substances is alleged.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) **is a controlled substance.**

To prove the crime of (crime charged), **the State must prove the following** (applicable number) **elements beyond a reasonable doubt:**

1. (Defendant)

[sold]
[purchased]
[delivered]
[possessed]

more than 10 grams of a certain substance.

2. **The substance was** (specific substance alleged).

Give if possession is charged

3. (Defendant) **had knowledge of the presence of the substance.**

§ 6.15

DRUG OFFENSES

6-301

Definitions; give as applicable

Sell

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Deliver § 893.02(5), Fla.Stat.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Possession

To “possess” means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

(a) the thing is in the hand of or on the person, or

**(b) the thing is in a container in the hand of or on the person,
or**

(c) the thing is so close as to be within ready reach and is under the control of the person.

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was

6-302 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

within the person's presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Lesser Included Offenses

SALE OR DELIVERY OR POSSESSION OF MORE THAN 10 GRAMS OF CONTROLLED SUBSTANCE — 893.13(1)(b)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sale or delivery of controlled substance		893.13(1)(a)	25.2
	Attempt, except when delivery is charged	777.04(1)	5.1
	If possession is charged	893.13(6)(a)	

Comment

If the defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruction may be required. *See State v. Medlin*, 273 So.2d 394 (Fla. 1973).

This instruction was adopted in 1981 and amended in 1989 and 1997.

§ 6.15

DRUG OFFENSES

6–303

25.4 DRUG ABUSE — DELIVERY TO OR USE OF MINOR

§ 893.13(1)(c), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) is a controlled substance.

To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:

- 1. a. [(Defendant) delivered a certain substance to a person under the age of 18 years.]**

Give 1a, 1b, or 1c as applicable

- b. [(Defendant) used or hired a person under the age of 18 years as an agent or employee in the sale or delivery of a certain substance.]**
 - c. [(Defendant) used a person under the age of 18 years to assist in avoiding detection or apprehension for (violation of Chapter 893, Fla.Stat., alleged).]**
- 2. The substance was (specific substance alleged).**
 - 3. (Defendant) was 18 years of age or older at the time.**

Definition § 893.02(5), Fla.Stat.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

6-304

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

Lesser Included Offenses

SALE, MANUFACTURE, DELIVERY, ETC. NEAR PUBLIC OR PRIVATE ELEMENTARY, MIDDLE OR SECONDARY SCHOOL — 893.13(1)(c)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sale, manufacture, delivery, etc.		893.13(1)(a)	25.2
	Attempt, except when delivery is charged	777.04(1)	5.1
	If possession is charged and the offense would be a second degree felony under 893.13(1)(a)1	893.13(6)(a)	
	If possession of cannabis is charged	893.13(6)(b)	
	If delivery of cannabis is charged	893.13(3)	

Comment

This instruction was adopted in 1981 and amended in 1989.

25.5 DRUG ABUSE — BRINGING INTO STATE

§ 893.13(1)(d), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) is a controlled substance.

To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) brought a certain substance into Florida.

§ 6.15

DRUG OFFENSES

6–305

2. **The substance was** (specific substance alleged).
3. (Defendant) **had knowledge of the presence of the substance.**

Definition

To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or
- (b) the thing is in a container in the hand of or on the person,
or
- (c) the thing is so close as to be within ready reach and is under the control of the person.

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

6-306 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

—

Lesser Included Offenses

SALE, MANUFACTURE, DELIVERY, ETC. NEAR A COLLEGE, UNIVERSITY, OTHER POST-SECONDARY EDUCATIONAL INSTITUTION OR PUBLIC PARK — 893.13(1)(d)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Sale, manufacture, delivery, etc.		893.13(1)(a)	25.2
	Attempt, except when delivery is charged	777.04(1)	5.1
	If possession is charged and the offense would be a second degree felony under 893.13(1)(a)1	893.13(6)(a)	
	If possession of cannabis is charged	893.13(6)(b)	
	If delivery of cannabis is charged	893.13(3)	

—

Comment

If the defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruction may be required. *See State v. Medlin*, 273 So.2d 394 (Fla. 1973).

This instruction was adopted in 1981 and amended in 1997.

§ 6.15

DRUG OFFENSES

6-307

25.6 DRUG ABUSE — SALE, PURCHASE, MANUFACTURE, OR DELIVERY IN SPECIFIED LOCATIONS

§ 893.13(1)(c), (d) and (e)

To prove the crime of (crime charged), the state must prove the following four elements beyond a reasonable doubt:

1. (Defendant)

[sold]

[purchased]

[manufactured]

[delivered]

[possessed with intent to sell]

[possessed with intent to manufacture]

[possessed with intent to deliver]

a certain substance

Give a, b or c as applicable

2. a. in, on, or within 1,000 feet of the real property comprising a child care facility or a public or private elementary, middle, or secondary school between the hours of 6:00 a.m. to 12:00 a.m. (§ 893.13(1)(c), *Fla.Stat.*)

b. in, on, or within 200 feet of [the real property comprising a public housing facility] [the real property comprising a public or private college, university, or other postsecondary educational institution] [a public park]. (§ 893.13(1)(d), *Fla.Stat.*)

c. in, on, or within 1000 feet of [a physical place for worship at which a church or religious organization regularly conducts a religious services] [a convenience business]. (§ 893.13(1)(e), *Fla.Stat.*)

3. The substance was (specific substance alleged).

4. (Defendant) had knowledge of the presence of the substance.

Definitions: give as applicable.

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

6-308

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

To “possess” means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means:

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person,**
or
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

Give if applicable.

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable.

If a thing is in a place over which the person does not have control, in order to establish constructive possession the state must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

§ 6.15

DRUG OFFENSES

6-309

If a person has exclusive possession of a thing, knowledge of its presence may be inferred.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Definitions. Give as applicable

“Child care facility” means any child care center or arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care. It does not matter if the child care facility is operated for profit or as a nonprofit operation.

A “convenience business” means any place of business that is primarily engaged in the retail sale of groceries, or both groceries and gasoline, and that is open for business at any time between the hours of 11 p.m. and 5 a.m. The term does not include any of the following: a business that is primarily a restaurant, or one that always has at least five employees on the premises after 11 p.m. and before 5 a.m., or one that has at least 10,000 square feet of retail floor space. The term “convenience business” also does not include any business in which the owner or members of his family work between the hours of 11 p.m. and 5 a.m.

The term “real property comprising a public housing facility” is defined as the real property of a public corporation created as a housing authority by statute.

Lesser Included Offenses

DRUG ABUSE — POSSESSION ON OR NEAR SCHOOL — 893.13(1)(e)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Drug abuse possession		893.13(1)(f)	25.7
None			

6-310

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

Comment

This instruction is based on section 893.13, Florida Statutes (1997), and adapted from the standard instruction on sale of contraband near a school. In *Chicone v. State*, 684 So.2d 736 (Fla. 1996), the court defined the elements of constructive possession that apply if the defendant has no control over the place where the contraband was found.

This instruction was adopted in 1981 and amended in 1989, 1997, and 2000.

25.7 DRUG ABUSE — POSSESSION

§ 893.13(1)(f), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) is a controlled substance.

To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) possessed a certain substance.**
- 2. The substance was (specific substance alleged).**
- 3. (Defendant) had knowledge of the presence of the substance.**

Definition

To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person,
or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

§ 6.15

DRUG OFFENSES

6-311

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, (2) knowledge that the thing was within the person's presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comment

If the defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruction may be required. *See State v. Medlin, 273 So.2d 394 (Fla. 1973).*

Note § 893.13(1)(g), Fla.Stat., if the charge involves possession or delivery without consideration of not more than 20 grams of cannabis.

This instruction was adopted in 1981 and amended in 1989 and 1997.

6-312 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

**25.8 DRUG ABUSE — OBTAINING CONTROLLED
SUBSTANCE BY FRAUD, ETC.**

§ 893.13(3)(a)1, Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) is a controlled substance.

To prove the crime of Obtaining a Controlled Substance by

[misrepresentation]

[fraud]

[forgery]

[deception]

[subterfuge]

the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) [acquired or obtained] [attempted to acquire or obtain] possession of a certain substance.**
- 2. The substance was (specific substance alleged).**
- 3. (Defendant) [acquired or obtained] [attempted to acquire or obtain] the substance by**

[misrepresentation].

[fraud].

[forgery].

[deception].

[subterfuge].

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comment

This instruction was adopted in 1981 and amended in 1989.

§ 6.15

DRUG OFFENSES

6–313

25.9 TRAFFICKING IN CANNABIS

§ 893.135(1)(a), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” Cannabis is a controlled substance.

To prove the crime of Trafficking in Cannabis, the State must prove the following four elements beyond a reasonable doubt:

1. (Defendant) **knowingly**

[sold]

[purchased]

[manufactured]

[delivered]

[brought into Florida]

[possessed]

a certain substance.

2. The substance was cannabis.

3. The quantity of the cannabis involved was in excess of 50 pounds.

See State v. Dominguez, 509 So.2d 917 (Fla. 1987)

4. (Defendant) **knew that the substance was cannabis.**

If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin, but actually sold cannabis, the alternate element 4 would be given.

- [4. (Defendant) **intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] cannabis.]**

Definitions; give as applicable

Sell

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

6-314 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

Manufacture § 893.02(12)(a), Fla.Stat.

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

Deliver § 893.02(5), Fla.Stat.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Possession

To “possess” means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or
- (b) the thing is in a container in the hand of or on the person,
or
- (c) the thing is so close as to be within ready reach and is under the control of the person.

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the

§ 6.15

DRUG OFFENSES

6-315

person's (1) control over the thing, (2) knowledge that the thing was within the person's presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

See State v. Weller, 590 So.2d 923 (Fla. 1991)

The punishment provided by law for the crime of Trafficking in Cannabis is greater depending on the amount of cannabis involved. Therefore, if you find the defendant guilty of trafficking in cannabis, you must determine by your verdict whether:

Enhanced penalty; give if applicable up to extent of charge

- a. [The quantity of the substance involved was in excess of 50 pounds but less than 2,000 pounds.]
- b. [The quantity of the substance involved was 2,000 pounds or more but less than 10,000 pounds.]
- c. [The quantity of the substance involved was 10,000 pounds or more.]

6-316

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

Lesser Included Offenses

TRAFFICKING IN CANNABIS — 893.135(1)(a)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Trafficking offenses requiring lower quantities of cannabis		893.135(1)(a)1 and 2	25.9
	Attempt (but not conspiracy), except when delivery is charged	777.04(1)	5.1
	If sale, manufacture or delivery is charged	893.13(1)(a)	25.2
	If purchase is charged	893.13(2)(a)	
	Bringing cannabis into state	893.13(5)	
	Possession of cannabis — if less than 20 grams of cannabis	893.13(6)(a)	
	Delivery of less than 20 grams of cannabis	893.13(3)	

Comment

This instruction was adopted in 1981 and amended in 1989 and 1997.

25.10 TRAFFICKING IN COCAINE

§ 893.135(1)(b), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” Cocaine or any mixture containing cocaine is a controlled substance.

§ 6.15

DRUG OFFENSES

6-317

To prove the crime of Trafficking in Cocaine, the State must prove the following four elements beyond a reasonable doubt:

1. (Defendant) knowingly

[sold]
[purchased]
[manufactured]
[delivered]
[brought into Florida]
[possessed]

a certain substance.

2. The substance was [cocaine] [a mixture containing cocaine].

3. The quantity of the substance involved was 28 grams or more.

See State v. Dominguez, 509 So.2d 917 (Fla. 1987)

4. (Defendant) knew that the substance was [cocaine] [a mixture containing cocaine].

If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold cocaine, the alternate element 4 would be given.

[4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] cocaine or a mixture containing cocaine.]

Definitions; give as applicable

Sell

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Manufacture § 893.02(12)(a), Fla.Stat.

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing,

6-318 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

Deliver § 893.02(5), Fla.Stat.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Possession

To “possess” means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person,
or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

§ 6.15

DRUG OFFENSES

6-319

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

See State v. Weller, 590 So.2d 923 (Fla. 1991)

The punishment provided by law for the crime of Trafficking in Cocaine is greater depending on the amount of cocaine involved. Therefore, if you find the defendant guilty of trafficking in cocaine, you must determine by your verdict whether:

Enhanced penalty; give if applicable up to extent of charge

- a. [The quantity of the substance involved was in excess of 28 grams but less than 200 grams.]
- b. [The quantity of the substance involved was 200 grams or more but less than 400 grams.]
- c. [The quantity of the substance involved was 400 grams or more but less than 150 kilograms.]
- d. [The quantity of the substance involved was 150 kilograms or more but less than 300 kilograms.]

6-320

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

Lesser Included Offenses

TRAFFICKING IN COCAINE — 893.135(1)(b)1 & 2			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Trafficking offenses requiring lower quantities of cocaine		893.135(1)(b)1	25.10
	Attempt (but not conspiracy), except when delivery is charged	777.04(1)	5.1
	If sale, manufacture or delivery is charged	893.13(1)(a)	25.2
	If purchase is charged	893.13(2)(a)	
	Bringing cocaine into state	893.13(5)	
	Possession of cocaine	893.13(6)(a)	

Comment

This instruction was adopted in 1981 and amended in 1989 and 1997.

25.11 TRAFFICKING IN ILLEGAL DRUGS

§ 893.135(1)(c), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) or any mixture containing (specific substance alleged) is a controlled substance.

To prove the crime of Trafficking in Illegal Drugs, the State must prove the following four elements beyond a reasonable doubt:

1. (Defendant) **knowingly**

[sold]

[purchased]

§ 6.15

DRUG OFFENSES

6–321

[manufactured]
 [delivered]
 [brought into Florida]
 [possessed]

a certain substance.

2. The substance was [(specific substance alleged)] [a mixture containing (specific substance alleged)].

3. The quantity of the substance involved was 28 grams or more.

See State v. Dominguez, 509 So.2d 917 (Fla. 1987)

4. (Defendant) knew that the substance was [(specific substance alleged)] [a mixture containing (specific substance alleged)].

If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold (specific substance alleged), the alternate element 4 would be given.

[4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] (specific substance alleged) or a mixture containing (specific substance alleged).]

Definitions; give as applicable

Sell

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Manufacture § 893.02(12)(a), Fla.Stat.

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of

6-322 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

Deliver § 893.02(5), *Fla.Stat.*

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Possession

To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person,
or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

§ 6.15

DRUG OFFENSES

6–323

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

See State v. Weller, 590 So.2d 923 (Fla. 1991)

The punishment provided by law for the crime of Trafficking in Illegal Drugs is greater depending on the amount of (specific substance alleged) involved. Therefore, if you find the defendant guilty of trafficking in illegal drugs, you must determine by your verdict whether:

Enhanced penalty; give if applicable up to extent of charge

- a. **[The quantity of the substance involved was in excess of 4 grams but less than 14 grams.]**
 - b. **[The quantity of the substance involved was 14 grams or more but less than 28 grams.]**
 - c. **[The quantity of the substance involved was 28 grams or more but less than 30 kilograms.]**
 - d. **[The quantity of the substance involved was 30 kilograms or more but less than 60 kilograms.]**
-

6-324

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

Lesser Included Offenses

TRAFFICKING IN ILLEGAL DRUGS — 893.135(1)(c)1 and 2			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Trafficking offenses requiring lower quantities of illegal drugs		893.135(1)(c)1	25.11
	Attempt (but not conspiracy), except when delivery is charged	777.04(1)	5.1
	If sale, manufacture or delivery is charged	893.13(1)(a)	25.2
	If purchase is charged	893.13(2)(a)	
	Bringing same illegal drug as charged into state	893.13(5)	
	Possession of same illegal drug	893.13(6)(a)	

Comment

This instruction was adopted in 1981 and amended in 1989 and 1997.

25.12 TRAFFICKING IN PHENCYCLIDINE

§ 893.135(1)(d), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” Phencyclidine or any mixture containing phencyclidine is a controlled substance.

To prove the crime of Trafficking in Phencyclidine, the State must prove the following four elements beyond a reasonable doubt:

- 1. (Defendant) knowingly**

§ 6.15

DRUG OFFENSES

6-325

[sold]
 [purchased]
 [manufactured]
 [delivered]
 [brought into Florida]
 [possessed]

a certain substance.

2. The substance was [phencyclidine] [a mixture containing phencyclidine].
3. The quantity of the substance involved was 28 grams or more.

See State v. Dominguez, 509 So.2d 917 (Fla. 1987)

4. (Defendant) knew that the substance was [phencyclidine] [a mixture containing phencyclidine].

If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold phencyclidine, the alternate element 4 would be given.

- [4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] phencyclidine or a mixture containing phencyclidine.]

Definitions; give as applicable

Sell

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Manufacture § 893.02(12)(a), Fla.Stat.

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of

6-326

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

Deliver § 893.02(5), Fla.Stat.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Possession

To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

§ 6.15

DRUG OFFENSES

6-327

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

See State v. Weller, 590 So.2d 923 (Fla. 1991)

The punishment provided by law for the crime of Trafficking in Phencyclidine is greater depending on the amount of phencyclidine involved. Therefore, if you find the defendant guilty of trafficking in phencyclidine, you must determine by your verdict whether:

Enhanced penalty; give if applicable up to extent of charge

- a. **[The quantity of the substance involved was in excess of 28 grams but less than 200 grams.]**
- b. **[The quantity of the substance involved was 200 grams or more but less than 400 grams.]**
- c. **[The quantity of the substance involved was 400 grams or more but less than 800 grams.]**

6-328

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

Lesser Included Offenses

TRAFFICKING IN PHENCYCLIDINE — 893.135(1)(d)1			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Trafficking offenses requiring lower quantities of phencyclidine		893.135(1)(d)1. a and b	25.9
	Attempt (but not conspiracy), except when delivery is charged	777.04(1)	5.1
	If sale, manufacture or delivery is charged	893.13(1)(a)	25.2
	If purchase is charged	893.13(2)(a)	
	Bringing phencyclidine into state	893.13(5)	
	Possession of phencyclidine	893.13(6)(a)	

Comment

This instruction was adopted in 1981 and amended in 1987, 1989, and 1997.

25.13 TRAFFICKING IN METHAQUALONE

§ 893.135(1)(e), Fla.Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” Methaqualone or any mixture containing methaqualone is a controlled substance.

To prove the crime of Trafficking in Methaqualone, the State must prove the following four elements beyond a reasonable doubt:

§ 6.15

DRUG OFFENSES

6–329

1. (Defendant) **knowingly**

[sold]

[purchased]

[manufactured]

[delivered]

[brought into Florida]

[possessed]

a certain substance.

2. The substance was [methaqualone] [a mixture containing methaqualone].

3. The quantity of the substance involved was 28 grams or more.

*See State v. Dominguez, 509 So.2d 917 (Fla. 1987)*4. (Defendant) **knew that the substance was [methaqualone] [a mixture containing methaqualone].**

If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold methaqualone, the alternate element 4 would be given.

[4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] methaqualone or a mixture containing methaqualone.]

Definitions; give as applicable

Sell

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Manufacture § 893.02(12)(a), Fla.Stat.

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or

6-330

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

Deliver § 893.02(5), Fla.Stat.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Possession

To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

(a) the thing is in the hand of or on the person, or

**(b) the thing is in a container in the hand of or on the person,
or**

(c) the thing is so close as to be within ready reach and is under the control of the person.

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

§ 6.15

DRUG OFFENSES

6-331

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

See State v. Weller, 590 So.2d 923 (Fla. 1991)

The punishment provided by law for the crime of Trafficking in Methaqualone is greater depending on the amount of methaqualone involved. Therefore, if you find the defendant guilty of trafficking in methaqualone, you must determine by your verdict whether:

Enhanced penalty; give if applicable up to extent of charge

- a. **[The quantity of the substance involved was in excess of 200 grams but less than 5 kilograms.]**
- b. **[The quantity of the substance involved was 5 kilograms or more but less than 25 kilograms.]**
- c. **[The quantity of the substance involved was 25 kilograms or more but less than 50 kilograms.]**

6-332

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

Lesser Included Offenses

TRAFFICKING IN METHAQUALONE — 893.135(1)(e)1			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Trafficking offenses requiring lower quantities of!!a and b methaqualone			25.13
	Attempt (but not conspiracy), except when delivery is charged	777.04(1)	5.1
	If sale, manufacture or delivery is charged	893.13(1)(a)	25.2
	If purchase is charged	893.13(2)(a)	
	Bringing methaqualone into state	893.13(5)	
	Possession of methaqualone	893.13(6)(a)	

Comment

This instruction was adopted in 1981 and amended in 1989 and 1997.

**25.14 DRUG ABUSE — USE OR POSSESSION OF
DRUG PARAPHERNALIA**

§ 893.147(1), Fla.Stat.

To prove the crime of Use or Possession of Drug Paraphernalia, the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) used or had in [his] [her] possession with intent to use drug paraphernalia.**

§ 6.15

DRUG OFFENSES

6-333

- 2. (Defendant) had knowledge of the presence of the drug paraphernalia.**

Definitions

Possession

To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or
- (b) the thing is in a container in the hand of or on the person,
or
- (c) the thing is so close as to be within ready reach and is under the control of the person.

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

6-334 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

Drug Paraphernalia § 893.145, Fla.Stat.

The term “drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

Give specific definition as applicable

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

§ 6.15

DRUG OFFENSES

6–335

(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.

(b) Water pipes.

(c) Carburetion tubes and devices.

(d) Smoking and carburetion masks.

(e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.

(f) Miniature cocaine spoons, and cocaine vials.

(g) Chamber pipes.

(h) Carburetor pipes.

(i) Electric pipes.

(j) Air-driven pipes.

(k) Chillums.

(l) Bongs.

(m) Ice pipes or chillers.

6-336 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

Relevant factors § 893.146, Fla.Stat.

In addition to all other logically relevant factors, the following factors shall be considered in determining whether an object is drug paraphernalia:

(1) Statements by an owner or by anyone in control of the object concerning its use.

(2) The proximity of the object, in time and space, to a direct violation of this act.

(3) The proximity of the object to controlled substances.

(4) The existence of any residue of controlled substances on the object.

(5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom [he] [she] knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.

(6) Instructions, oral or written, provided with the object concerning its use.

(7) Descriptive materials accompanying the object which explain or depict its use.

(8) Any advertising concerning its use.

(9) The manner in which the object is displayed for sale.

(10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.

(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.

(12) The existence and scope of legitimate uses for the object in the community.

(13) Expert testimony concerning its use.

§ 6.15

DRUG OFFENSES

6-337

Lesser Included Offenses

POSSESSION OF DRUG PARAPHERNALIA — 893.147(1)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1

Comment

This instruction was adopted in 1981 and amended in 1989, 1992 and 1997.

**25.15 DRUG ABUSE — DELIVERY, POSSESSION WITH
INTENT TO DELIVER, OR MANUFACTURE WITH
INTENT TO DELIVER DRUG PARAPHERNALIA**
§ 893.147(2), Fla.Stat.

To prove the crime of (crime charged), the State must prove the following (applicable number) elements beyond a reasonable doubt:

1. (Defendant)
 - [delivered]
 - [possessed with intent to deliver]
 - [manufactured with intent to deliver]

drug paraphernalia.

Give only if possession is charged

2. (Defendant) **had knowledge of the presence of the drug paraphernalia.**
3. (Defendant) **knew or reasonably should have known that the drug paraphernalia would be used to plant, propagate, cultivate,**

6-338

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body (specific substance alleged).

Definitions

Possession; give if possession is charged

To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

(a) the thing is in the hand of or on the person, or

(b) the thing is in a container in the hand of or on the person,
or

(c) the thing is so close as to be within ready reach and is under the control of the person.

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person’s (1) control over the thing, (2) knowledge that the thing was within the person’s presence, and (3) knowledge of the illicit nature of the thing.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

§ 6.15

DRUG OFFENSES

6-339

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Deliver; give if delivery is charged § 893.02(4), Fla.Stat.

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Manufacture; give if manufacture is charged § 893.02(11)(a), Fla.Stat.

“Manufacture” means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of

natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

Drug Paraphernalia § 893.145, Fla.Stat.

The term “drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

6-340

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.

(b) Water pipes.

(c) Carburetion tubes and devices.

(d) Smoking and carburetion masks.

(e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.

§ 6.15

DRUG OFFENSES

6–341

- (f) **Miniature cocaine spoons, and cocaine vials.**
- (g) **Chamber pipes.**
- (h) **Carburetor pipes.**
- (i) **Electric pipes.**
- (j) **Air-driven pipes.**
- (k) **Chillums.**
- (l) **Bongs.**
- (m) **Ice pipes or chillers.**

Relevant factors § 893.146, Fla.Stat.

In addition to all other logically relevant factors, the following factors shall be considered in determining whether an object is drug paraphernalia:

- (1) **Statements by an owner or by anyone in control of the object concerning its use.**
- (2) **The proximity of the object, in time and space, to a direct violation of this act.**
- (3) **The proximity of the object to controlled substances.**
- (4) **The existence of any residue of controlled substances on the object.**
- (5) **Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom [he] [she] knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.**
- (6) **Instructions, oral or written, provided with the object concerning its use.**
- (7) **Descriptive materials accompanying the object which explain or depict its use.**
- (8) **Any advertising concerning its use.**

6-342 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

(9) The manner in which the object is displayed for sale.

(10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.

(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.

(12) The existence and scope of legitimate uses for the object in the community.

(13) Expert testimony concerning its use.

Lesser Included Offenses

DELIVERY, POSSESSION WITH INTENT TO DELIVER, OR MANUFACTURE WITH INTENT TO DELIVER DRUG PARAPHERNALIA — 893.147(2)			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt, except when delivery is charged	777.04(1)	5.1

Comment

This instruction was adopted in 1981 and amended in 1989 and 1997.

**25.16 DRUG ABUSE — DELIVERY OF DRUG
PARAPHERNALIA TO A MINOR**
§ 893.147(3), Fla.Stat.

To prove the crime of Delivery of Drug Paraphernalia to a Minor, the State must prove the following three elements beyond a reasonable doubt:

§ 6.15

DRUG OFFENSES

6-343

1. (Defendant) **delivered drug paraphernalia to** (person alleged).
2. (Defendant) **knew or reasonably should have known that the drug paraphernalia would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body** (specific substance alleged).
3. **When the delivery was made, (defendant) was 18 years old or over and (person alleged) was under 18 years old.**

*Definitions**Deliver § 893.02(4), Fla.Stat.*

“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Drug Paraphernalia § 893.145, Fla.Stat.

The term “drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. In includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

6-344

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.

(b) Water pipes.

(c) Carburetion tubes and devices.

(d) Smoking and carburetion masks.

(e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.

§ 6.15

DRUG OFFENSES

6-345

- (f) **Miniature cocaine spoons, and cocaine vials.**
- (g) **Chamber pipes.**
- (h) **Carburetor pipes.**
- (i) **Electric pipes.**
- (j) **Air-driven pipes.**
- (k) **Chillums.**
- (l) **Bongs.**
- (m) **Ice pipes or chillers.**

Relevant factors § 893.146, Fla.Stat.

In addition to all other logically relevant factors, the following factors shall be considered in determining whether an object is drug paraphernalia:

- (1) **Statements by an owner or by anyone in control of the object concerning its use.**
- (2) **The proximity of the object, in time and space, to a direct violation of this act.**
- (3) **The proximity of the object to controlled substances.**
- (4) **The existence of any residue of controlled substances on the object.**
- (5) **Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.**
- (6) **Instructions, oral or written, provided with the object concerning its use.**
- (7) **Descriptive materials accompanying the object which explain or depict its use.**
- (8) **Any advertising concerning its use.**

6-346 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.15

(9) The manner in which the object is displayed for sale.

(10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.

(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.

(12) The existence and scope of legitimate uses for the object in the community.

(13) Expert testimony concerning its use.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comment

This instruction was adopted in 1981 and amended in 1989.

25.17 CONTRABAND IN COUNTY DETENTION FACILITY § 951.22, Fla.Stat.

To prove the crime of (crime charged), the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant)

**[introduced contraband into]
[knowingly possessed contraband in]
[gave contraband to an inmate in]
[received contraband from an inmate in]
[took contraband from]
[attempted to take or send contraband from]**

a county detention facility.

2. (Defendant) did not do so through regular channels as duly authorized by the Sheriff or officer in charge of the facility.

§ 6.15

DRUG OFFENSES

6-347

The court now instructs you that for purposes of this offense, “contraband” means:

Select definition depending upon item alleged

[any currency or coin]
[any article of food or clothing]
[any written or recorded communication]
[any intoxicating beverage or beverage which causes or may cause an intoxicating effect]
[any narcotic, hypnotic or excitative drug]
[any drug of any kind, including nasal inhalation]
[sleeping pill] [barbiturate]
[any controlled substance. [(Item alleged)] is a controlled substance]
[any firearm]
[any instrumentality that may be or is intended to be used as a dangerous weapon]
[any instrumentality that may be or is intended to be used as an aid in attempting to escape].

Definition § 951.23(1), Fla.Stat.

“County detention facility” means a county jail, a county stockade, a county prison camp, a county residential probation center, and any other place used by a county or county officer to detain persons charged with or convicted of crimes, including the grounds thereof.

In event of municipal facility involved, see statute.

Definition; give as applicable

To “introduce” means to put inside or into.

See 25.2 for definition of “possession.”

6-348

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.15

Lesser Included Offenses

CONTRABAND IN COUNTY DETENTION FACILITIES — 951.22			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Possession of less than 20 grams of cannabis	893.13(6)(b)	

Comment

This instruction was adopted in 1987 and amended in 1989.

25.18 CONTRABAND IN JUVENILE FACILITY

§ 985.4046, Fla.Stat.

To prove the crime of [introducing] [removing] [possession] of contraband in a juvenile detention facility, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant)
 - [introduced contraband into]**
 - [knowingly possessed contraband in]**
 - [gave contraband to a juvenile offender in]**
 - [took contraband from]**
 - [attempted to take or send contraband from]**
 - [sent contraband to]**
 - a [juvenile detention facility] [juvenile commitment program].**
2. (Defendant) **did not do so as authorized by the [program policy] [operating procedure] [facility superintendent] [program director] [manager].**

“Introduce” means to put inside or into.

Possession may be actual or constructive.

§ 6.15

DRUG OFFENSES

6-349

Actual possession means:

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

Give if applicable.

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable.

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, (2) knowledge that the thing was within the person's presence, and (3) knowledge of the illicit nature of the thing.

For purposes of this offense, "contraband" means:

- [any unauthorized article of food or clothing]**
- [any intoxicating beverage or any beverage that causes or may cause an intoxicating effect]**
- [any controlled substance. (Substance alleged) is a controlled substance.] See s. 893.02(4).**
- [any prescription or nonprescription drug that has a hypnotic, stimulating, or depressing effect]**
- [any firearm or weapon of any kind or any explosive substance].**

Give as applicable

A "juvenile detention facility" is a facility used pending court adjudication or disposition or execution of a court order for the

6–350 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.16

temporary care of a child alleged or found to have committed a violation of law.

A “juvenile commitment program” is a facility used for the commitment of adjudicated delinquents.

Lesser Included Offenses

No lesser included offenses have been identified for this offense.

Comment

This instruction is based on the text of section 985.4046, Florida Statutes (1997). In *Chicone v. State*, 684 So.2d 736 (Fla. 1996), the court defined the elements of constructive possession that apply if the defendant has no control over the place where the contraband was found.

This instruction was adopted March 2000.

§ 6.16. RELATED STATUTES

240.133 Expulsion and discipline of students of the State University System and community colleges.—

(1) Each student in the State University System and each student in a community college is subject to federal and state law, respective county and municipal ordinances, and all rules and regulations of the Board of Regents or board of trustees of the community college.

(2) Violation of these published laws, ordinances, or rules and regulations may subject the violator to appropriate action by the university or community college authorities.

(3) Each president of a university in the State University System and each president of a community college shall have authority, after notice to the student of the charges and after a hearing thereon, to expel, suspend, or otherwise discipline any student who is found

§ 6.16

DRUG OFFENSES

6-351

to have violated any law, ordinance, or rule or regulation of the Board of Regents or of the board of trustees of the community college. A student may be entitled to waiver of expulsion:

- (a) If he provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals or of any other person engaged in violations of chapter 893 within the State University System or community colleges;
- (b) If he voluntarily discloses his violations of chapter 893 prior to his arrest; or
- (c) If he commits himself, or is referred by the court in lieu of sentence, to a state-licensed drug abuse program and successfully completes the program.

History.—ss. 1, 2, 3, ch. 69 366; ss. 2, 3, ch. 70 362; s. 70, ch. 72 221; ss. 17, 18, ch. 73 331; s. 8, ch. 78 95; s. 93, ch. 79 222; s. 1, ch. 79 319; s. 144, ch. 81 259; s. 11, ch. 87 243.

Note.—Former s. 23g.582.

396.072 Treatment and services for intoxicated persons.

(1) Any person who is intoxicated in a public place and who appears in need of help, if he consents to the proffered help, may be assisted to his home or to an appropriate treatment resource, whether public or private, by a peace officer. Any person who is intoxicated in a public place and appears to be incapacitated shall be taken by the peace officer to a hospital or other appropriate treatment resource. A person shall be deemed incapacitated when he appears to be in immediate need of emergency medical attention or when he appears to be unable to make a rational decision about his need for care.

(2) In detaining an intoxicated person and taking him to a treatment resource, the peace officer shall proceed whenever possible with the consent of the intoxicated person. If the person appears to be incapacitated and refuses his consent, he may be taken to a hospital or other appropriate treatment resource against his will, but unreasonable force shall not be used; or, for his own protection, he may be detained in protective custody by the police or public safety

authority in any municipal or county jail or other detention facility for up to 72 hours. In addition, nothing contained in this section shall prevent the use of any municipal or county jail or other detention facility as a treatment resource in the same manner and to the same extent as is authorized by the other provisions of this chapter. If such protective custody is utilized and if the detention facility is not also a treatment resource, the officer in charge of the detention facility shall, within the first 8 hours of detention, notify the nearest treatment resource of the detention of the intoxicated person. It shall be the duty of the treatment resource, if necessary and appropriate, to arrange for the transportation from the detention facility to an appropriate treatment facility. The department, through any of its agencies, shall annually notify in writing each municipal and county public safety office of the name, address, and phone number of the treatment resource nearest each detention facility.

(3) Any person who is brought to a treatment resource shall be examined by a physician as soon as possible. The physician in charge of the treatment resource may admit a person as a patient or refer him to another facility for diagnosis or treatment. The treatment resource may provide emergency help to a person who is not admitted as a patient.

(4) Any person who at the time of admission to a treatment resource is incapacitated shall remain at the facility until he is no longer incapacitated, but not longer than 96 hours after his admission as a patient. Any person admitted to a treatment resource who is not incapacitated at the time of admission, or any person who is no longer incapacitated, may consent to remain at the treatment resource for as long as the person in charge believes warranted, but any patient who is not incapacitated shall be free to leave the facility at any time.

(5) Any person who is not admitted to a treatment resource or who is not referred to another resource and who has no funds may be taken to his home, if he has one.

(6) When a patient is admitted to a treatment resource, his family or next of kin shall be notified as promptly as possible. If a patient who is not incapacitated requests that there be no notification, his request shall be respected.

§ 6.16

DRUG OFFENSES

6-353

(7) The peace officer, in detaining an intoxicated person or in taking him to a treatment resource, shall be deemed to be taking him into protective custody. A taking into protective custody under this section shall not be considered an arrest for any purpose, and no entry or other record shall be made to indicate that he has been arrested or has been charged with a crime.

(8) A peace officer and any public safety office or agency who or which acts under this section shall be considered as acting in the conduct of their official duty and shall not be held criminally or civilly liable for false arrest or false imprisonment.

(9) If the physician in charge of the treatment resource determines that such a course is for the patient's benefit, a patient in a treatment resource shall be encouraged to agree to further diagnosis and to voluntary treatment at suitable inpatient, outpatient, or intermediate care facilities.

History.—s. 7, ch. 71 132; s. 1, ch. 74 257; s. 1, ch. 76 79; s. 23, ch. 84 285.

¹465.015 Violations and penalties.—

(1) It is unlawful for any person to own, operate, maintain, open, establish, conduct, or have charge of, either alone or with another person or persons, a pharmacy:

(a) Which is not registered under the provisions of this chapter.

(b) In which a person not licensed as a pharmacist in this state or not registered as an intern in this state or in which an intern who is not acting under the direct and immediate personal supervision of a licensed pharmacist fills, compounds, or dispenses any prescription or dispenses medicinal drugs.

(2) It is unlawful for any person:

(a) To make a false or fraudulent statement, either for himself or for another person, in any application, affidavit, or statement presented to the board or in any proceeding before the board.

(b) To fill, compound, or dispense prescriptions or to dispense medicinal drugs if such person does not hold an active license

6-354

FLORIDA CRIMINAL DEFENSE TRIAL MANUAL

§ 6.16

as a pharmacist in this state, is not registered as an intern in this state, or is an intern not acting under the direct and immediate personal supervision of a licensed pharmacist.

(c) To sell or dispense drugs as defined in s. 465.003(7) without first being furnished with a prescription.

(d) To sell samples or complimentary packages of drug products.

(3)(a) It is unlawful for any person other than a pharmacist licensed under this chapter to use the title “pharmacist” or “druggist” or otherwise lead the public to believe that he is engaged in the practice of pharmacy.

(b) It is unlawful for any person other than an owner of a pharmacy registered under this chapter to display any sign or to take any other action that would lead the public to believe that such person is engaged in the business of compounding, dispensing, or retailing any medicinal drugs. This paragraph shall not preclude a person not licensed as a pharmacist from owning a pharmacy.

(4) Any person who violates any provision of subsection (1) or subsection (3) is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, 775.083 or s. 775.084. Any person who violates any provision of subsection (2) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084. In any warrant, information, or indictment, it shall not be necessary to negative any exceptions, and the burden of any exception shall be upon the defendant.

History.—ss. 1, 7, ch. 79-226; ss. 2, 3, ch. 81-318; ss. 11, 26, 27, ch. 86-256; s. 59, ch. 91-137; s. 6, ch. 91-156; s. 91, ch. 91-224.

465.017 Authority to inspect.—

(1) Duly authorized agents and employees of the department shall have the power to inspect in a lawful manner at all reasonable hours any pharmacy, hospital, clinic, wholesale establishment, manufacturer, physician’s office, or any other place in the state in which drugs and medical supplies are manufactured, packed,

§ 6.16

DRUG OFFENSES

6-355

packaged, made, stored, sold, offered for sale, exposed for sale, or kept for sale for the purposes of:

- (a) Determining if any of the provisions of this chapter or any rule promulgated under its authority is being violated;
- (b) Securing samples or specimens of any drug or medical supply after paying or offering to pay for such sample or specimen; or
- (c) Securing such other evidence as may be needed for prosecution under this chapter.

(2) Except as permitted by this chapter, and chapters 406, 409, 455, 499, and 893, records maintained in a pharmacy relating to the filling of prescriptions and the dispensing of medicinal drugs shall not be furnished to any person other than to the patient for whom the drugs were dispensed, or his legal representative, or to the department pursuant to existing law, or, in the event that the patient is incapacitated or unable to request said records, his spouse except upon the written authorization of such patient. Such records may be furnished in any civil or criminal proceeding, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or his legal representative by the party seeking such records.

History.—ss.1, 7, ch. 79-226; ss. 2, 3, ch. 81-318; ss. 1, 2, ch. 85-151; ss. 26, 27, ch. 86-256; s. 59, ch. 91-137; s. 6, ch. 91-156; s. 4, ch. 91-429; s. 125, ch. 94-218.

¹465.023 Pharmacy permittee; disciplinary action.—

(1) The department or the board may revoke or suspend the permit of any pharmacy permittee, and may fine, place on probation, or otherwise discipline any pharmacy permittee who has:

- (a) Obtained a permit by misrepresentation or fraud or through an error of the department or the board;
- (b) Attempted to procure, or has procured, a permit for any other person by making, or causing to be made, any false representation;
- (c) Violated any of the requirements of this chapter or any of the rules of the Board of Pharmacy; of ²chapter 499, known

as the “Florida Drug and Cosmetic Act”; of 21 U.S.C. ss. 301–392, known as the “Federal Food, Drug, and Cosmetic Act”; of 21 U.S.C. ss. 821 et seq., known as the ³Federal Drug Abuse Act; or of chapter 893; or

(d) Been convicted or found guilty, regardless of adjudication, of a felony or any other crime involving moral turpitude in any of the courts of this state, or any other state, or of the United States.

(2) If a pharmacy permit is revoked or suspended, the owner, manager, or proprietor shall cease to operate the establishment as a pharmacy as of the effective date of such suspension or revocation. In the event of such revocation or suspension, the owner, manager, or proprietor shall remove from the premises all signs and symbols identifying the premises as a pharmacy. The period of such suspension shall be prescribed by the Board of Pharmacy, but in no case shall it exceed 1 year. In the event that the permit is revoked, the person owing or operating the establishment shall not be entitled to make application for a permit to operate a pharmacy for a period of 1 year from the date of such revocation. Upon the effective date of such revocation, the permittee shall advise the Board of Pharmacy of the disposition of the medicinal drugs located on the premise. Such disposition shall be subject to continuing supervision and approval by the Board of Pharmacy.

History. ss. 1, 7, ch. 79-226; ss. 2, 3, ch. 81-318; s. 38, ch. 83-216; ss. 35, 119, ch. 83-329; ss. 26, 27, ch. 86-256; s. 59, ch. 91-137; s. 6, ch. 91-156.

¹**Note.** Repealed effective October 1, 1997, by s. 27, ch. 86-256, as amended by s. 59, ch. 91-137, and by s. 6, ch. 91-156, and scheduled for review pursuant to s. 11.61.

²**Note.** The Florida Drug and Cosmetic Act includes ss. 499.001–499.081 but not ss. 499.401–499.503; see. s. 499.001.

³**Note.** The correct name of the Federal Drug Abuse Act appears to be the Comprehensive Drug Abuse Prevention and Control Act of 1970.

¹**465.185 Rebates prohibited; penalties.—**

(1) It is unlawful for any person to pay or receive any commission, bonus, kickback, or rebate or engage in any split-fee arrangements in any form whatsoever with any physician, surgeon, organization, agency, or person, either directly or indirectly, for patients referred to a pharmacy registered under this chapter.

§ 6.16

DRUG OFFENSES

6-357

(2) The department shall adopt rules which assess administrative penalties for acts prohibited by subsection (1). In the case of an entity licensed by the department, such penalties may include any disciplinary action available to the department under the appropriate licensing laws. In the case of an entity not licensed by the department, such penalties may include:

(a) A fine not to exceed \$1,000.

(b) If applicable, a recommendation by the department to the appropriate regulatory agency that disciplinary action be taken.

History. s. 2, ch. 79-106; s. 326, ch. 81-259; s. 2, ch. 81-318; ss. 26, 27, ch. 86-256; s. 59, ch. 91-137; s. 6, ch. 91-156; s. 4, ch. 91-429; s. 125, ch. 92-149.

¹**Note.** Repealed effective October 1, 1997, by s. 27, ch. 86-256, as amended by s. 59, ch. 91-137, and by s. 6, ch. 91-156, and scheduled for review pursuant to s. 11.61.

831.30 Medicinal drugs; fraud in obtaining.—

Whoever:

(1) Falsely makes, alters, or forges any prescription, as defined in s. 465.031(2), for a medicinal drug other than a drug controlled by chapter 893;

(2) Knowingly causes such prescription to be falsely made, altered, forged, or counterfeited; or

(3) Passes, utters or publishes such prescription or otherwise knowingly holds out such false or forged prescription as true,

with intent to obtain such drug, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A second or subsequent conviction shall constitute a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

§ 922.051 Imprisonment in county jail, term of 1 year or less.—

When a statute expressly directs that imprisonment be in a state prison, the court may impose a sentence of imprisonment in the county jail if the total of the prisoner's cumulative sentences is not more than 1 year.

6-358 FLORIDA CRIMINAL DEFENSE TRIAL MANUAL § 6.16

See also,

Chapter 859: Poisons; Adulterated Drugs.

Chapter 500: Foods; Drugs; and Cosmetics.