

BILL ANALYSIS

Senate Research Center
79R233 PEP-D

S.B. 112
By: Van de Putte
Criminal Justice
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AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

A rapidly growing number of methamphetamine laboratories have been established across the nation and in Texas. These labs pose a serious problem to not only the users of methamphetamine, but also to citizens in the vicinity of these labs, due to the fact that the production of this drug is an extremely dangerous process, which is flammable and explosive. Additionally, methamphetamine is a highly addictive drug requiring intensive rehabilitation for its users, which places an increased burden on community rehabilitation programs.

Current law on this issue does not distinguish methamphetamine as a controlled substance with enhanced penalties. There are also no laws governing the sale of products containing pseudoephedrine, found in everyday cold medication, which is a necessary ingredient for methamphetamine, or requiring the reporting of wholesaler records.

As proposed, S.B. 112 enhances all penalties concerning the controlled substance methamphetamine by a degree, establishes a Methamphetamine Watch Program, limits the sales of products containing pseudoephedrine, and requires wholesalers to report orders of products containing pseudoephedrine.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the State Health Services Council and the Texas Board of Pharmacy in SECTION 2.03 (Section 486.003, Health and Safety Code) and SECTION 3.06 of this bill.

Rulemaking authority is expressly granted to the director of the Department of Public Safety in SECTION 3.05 of this bill.

SECTION BY SECTION ANALYSIS

ARTICLE 1. CIVIL AND CRIMINAL CONSEQUENCES OF ENGAGING IN CERTAIN CONDUCT RELATED TO THE MANUFACTURE OF METHAMPHETAMINE

SECTION 1.01. Amends Sections 481.112(b)-(f), Health and Safety Code, to increase the punishments for offenses (of manufacturing, delivering, or possessing a controlled substance) under Subsection (a) if the controlled substance is methamphetamine.

SECTION 1.02. Amends Subchapter D, Chapter 481, Health and Safety Code, by adding Section 481.1122, as follows:

Sec. 481.1122. MANUFACTURE OF METHAMPHETAMINE: PRESENCE OF CHILD. Sets forth further increased punishments for the manufacture of methamphetamine if, when the offense was committed, a child younger than 18 years of age was present on the premises where the offense was committed.

SECTION 1.03. Amends Section 481.124, Health and Safety Code, by amending Subsection (d) and adding Subsection (d-1), as follows:

(d) Creates an exception, as provided by Subsection (d-1), to the rule that an offense under this section (possession or transport of certain chemicals with intent to manufacture

controlled substance) is a felony of the second degree if the controlled substance is listed in Penalty Group 1 or 1-A.

(d-1) Provides that an offense under this section is a felony of the first degree if it is shown at the punishment phase of a trial of the offense that the person committed the offense with the intent to unlawfully manufacture methamphetamine, and when the offense was committed a child younger than 18 years of age was either present on the premises where the defendant was in possession of the chemical or in the vehicle in or on which the defendant was transporting the chemical.

SECTION 1.04. Amends Chapter 504, Health and Safety Code, by adding Section 504.003, as follows:

Sec. 504.003. INTENT TO FACILITATE THE MANUFACTURE OF METHAMPHETAMINE. Provides that if it is shown at the punishment phase of the trial of an offense under Section 504.001 (transportation or possession of anhydrous ammonia in an improper container) or 504.002 (using, delivering, or selling a container designed to hold anhydrous ammonia without the owner's permission, or tampering with equipment manufactured and used to hold, apply, or transport anhydrous ammonia without the owner's permission) that the person committed the offense with the intent to facilitate the manufacture of methamphetamine, the offense is a felony of the second degree.

SECTION 1.05. Amends Section 99.003, Civil Practice and Remedies Code, to make a manufacturer of methamphetamine strictly liable for any exposure by an individual to the manufacturing process for the greater of actual damages or \$20,000, rather than \$10,000, for each incident of exposure.

SECTION 1.06. Amends Article 17.15, Code of Criminal Procedure, by requiring a judge, magistrate, or officer who requires bail of less than \$300,000 for a defendant charged with the manufacture of methamphetamine, or less than \$500,000 if the accusation against the defendant includes an allegation that at the time of the offense a child younger than 18 years of age was present on the premises where the offense was committed, to state the reasons for setting the lesser amount in writing and include that writing in the record of the proceedings. Makes a nonsubstantive change.

SECTION 1.07. Amends Article 37.07, Code of Criminal Procedure, by adding Section 4A, as follows:

Sec. 4A. Requires the court, if in the penalty phase of the trial of an offense in which punishment is to be assessed by the jury rather than the court, and if the jury has found the defendant guilty of certain offenses involving the manufacture of methamphetamine, to charge the jury as provided by Section 4(b) (felonies of the first degree and certain other felonies) or (c) (felonies of the second or third degree and certain other felonies), as applicable. Requires the judge to amend the charge to accurately reflect the defendant's eligibility for parole as provided by Section 508.145 (Computation of Parole Eligibility Date), Government Code.

SECTION 1.08. Amends Section 262.104, Family Code, to require certain agencies or officials to take possession of a child in an emergency, without a court order, for the health and safety of that child, on personal knowledge or information furnished by another indicating that the parent or person who has possession of the child has permitted the child to remain on the premises used for the manufacture of methamphetamine. Makes a nonsubstantive change.

SECTION 1.09. Amends Section 508.145, Government Code, by amending Subsections (e) and (f) and adding Subsections (g), (h), and (i), as follows:

(e) Provides that an inmate serving a sentence for one of certain offenses involving the manufacture of methamphetamine that is punishable as a felony of the first degree or by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a felony of the first degree, who has been previously convicted of one of certain offenses involving the manufacture of methamphetamine that is

punishable as a felony of the first degree or by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a felony of the first degree, is not eligible for parole until the actual calendar time the inmate has served equals the term to which the inmate was sentenced or 25 calendar years, whichever is less.

(f) Provides that an inmate serving a sentence for one of certain offenses involving the manufacture of methamphetamine that is punishable by imprisonment for a minimum term or by a maximum fine that is more than a minimum term or maximum fine for a felony of the first degree is not eligible for release on parole until the actual calendar time the inmate has served equals the term to which the inmate was sentenced or 20 calendar years, whichever is less.

(g) Provides that an inmate serving a sentence for one of certain offenses involving the manufacture of methamphetamine that is punishable as a felony of the first degree is not eligible for release on parole until the actual calendar time the inmate has served equals the term to which the inmate was sentenced or 10 calendar years, whichever is less.

(h) Provides that an inmate serving a sentence for one of certain offenses involving the manufacture of methamphetamine that is punishable as a felony of the second or third degree is not eligible for release on parole until the actual calendar time the inmate has served equals the term to which the inmate was sentenced or five calendar years, whichever is less. Provides that except with respect to an increase to which Subsection (d) (requiring increased minimum jail time prior to parole for certain serious offenses) applies, an inmate serving a sentence for which the punishment is increased under Section 481.134 (increased punishment for drug-related crimes in certain designated areas), Health and Safety Code, is not eligible for release on parole until the actual calendar time the inmate has served equals the term to which the inmate was sentenced or five calendar years, whichever is less. Makes nonsubstantive changes.

(i) Redesignated from existing Subsection (f). Makes nonsubstantive changes.

ARTICLE 2. DISTRIBUTION AND RETAIL SALES OF PSEUDOEPHEDRINE

SECTION 2.01. Amends Subtitle B, Title 6, Health and Safety Code, by adding Chapter 468, as follows:

CHAPTER 468. METHAMPHETAMINE WATCH PROGRAM

Sec. 468.001. DEFINITIONS. Defines "department," "program," and "retailer."

Sec. 468.002. ESTABLISHMENT OF METHAMPHETAMINE WATCH PROGRAM. Requires the Department of State Health Services (department) to establish a methamphetamine watch program (program) to perform certain functions, including distribution of information regarding methamphetamine and implementing procedures to increase reporting of suspected methamphetamine manufacturing.

Sec. 468.003. RETAILER PARTICIPATION. Authorizes a retailer who sells products containing pseudoephedrine over-the-counter (retailer) to voluntarily participate in the program. Requires a retailer participating in the program to make reasonable efforts to deter the theft or improper sale of products used in the illicit manufacture of methamphetamine, including products containing pseudoephedrine, by implementing certain management practices and providing certain personnel training.

Sec. 468.004. REPORTING; IMMUNITY FROM LIABILITY. Provides that a person is not liable for any damages arising from an act relating to the reporting of information made in good faith in compliance with certain procedures.

Sec. 468.005. GRANT PROGRAM. Requires the criminal justice division of the governor's office to implement a grant program for public and private organizations to

engage in initiatives designed to support the methamphetamine watch program established under this chapter. Authorizes the grant recipient to use grant money only to pay for activities directly related to the purpose of the initiative. Authorizes the governor's office to accept gifts, grants, donations, and other contributions for the purpose of the grant program.

SECTION 2.02. Amends Chapter 481, Health and Safety Code, by adding Section 481.0771, as follows:

Sec. 481.0771. RECORDS AND REPORTS ON PSEUDOEPHEDRINE. (a) Requires a wholesaler who sells, transfers, or otherwise furnishes pseudoephedrine to a retailer to obtain a copy of the retailer's license to operate a pharmacy and certain other information prior to delivering the pseudoephedrine, and to make an accurate and legible record of the transaction and maintain the record for at least two years after the date of the transaction.

(b) Requires the wholesaler to submit to the director of the Department of Public Safety a monthly report which includes certain information.

(c) Requires the wholesaler, not later than five business days after receipt of an order for pseudoephedrine, to submit to the director a report of the order if the order meets certain criteria.

(d) Authorizes a wholesaler who, with reckless disregard for the duty to report under Subsection (c), fails to report as required by that subsection to be subject to disciplinary action.

SECTION 2.03. Amends Subtitle C, Title 6, Health and Safety Code, by adding Chapter 486, as follows:

CHAPTER 486. PSEUDOEPHEDRINE

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 486.001. DEFINITIONS. Defines "board," "commissioner," "council," "department," "executive director," "pseudoephedrine," and "sale." Provides that a term that is used in this chapter but is not defined by Subsection (a) has the meaning assigned by Section 481.002.

Sec. 486.002. APPLICABILITY. Provides that this chapter does not apply to the sale of any product dispensed or delivered by a pharmacist according to a prescription issued by a practitioner for a valid medical purpose and in the course of professional practice.

Sec. 486.003. RULES. Requires the State Health Services Council (council) to adopt rules necessary to implement and enforce Subchapter B. Requires the Texas Board of Pharmacy (board) to adopt rules necessary to implement and enforce Subchapter C.

[Reserves Sections 486.004-486.010 for expansion.]

SUBCHAPTER B. PROHIBITED SALES

Sec. 486.011. SALES BY ESTABLISHMENTS OTHER THAN PHARMACIES. Prohibits a business establishment that does not operate a pharmacy licensed by the board from engaging in over-the-counter sales of pseudoephedrine.

[Reserves Sections 486.012-486.020 for expansion.]

SUBCHAPTER C. REGULATED SALES

Sec. 486.021. APPLICABILITY. Provides that this subchapter applies only to a business establishment that operates a pharmacy licensed by the board.

Sec. 486.022. RESTRICTION OF ACCESS TO PSEUDOEPHEDRINE. Requires a business establishment that engages in over-the-counter sales of pseudoephedrine to display the pseudoephedrine in a manner that makes the pseudoephedrine accessible to a patron of the business establishment only with the assistance of an employee of the establishment.

Sec. 486.023. PREREQUISITES TO THE SALE OF PSEUDOEPHEDRINE. Requires the business establishment to follow certain procedures before completing an over-the-counter sale of pseudoephedrine including requiring the customer to show certain identification and sign for the purchase, making certain records, and taking action to ensure that a person does not purchase more than nine grams from that establishment in a 30-day period.

Sec. 486.024. MAINTENANCE OF RECORDS. Requires a business establishment that engages in over-the-counter sales of pseudoephedrine to maintain certain records of the sale in a secure, centralized location. Requires the establishment to maintain each record until at least the first anniversary of the date the record is made.

[Reserves Sections 486.025-486.030 for expansion.]

SUBCHAPTER D. ADMINISTRATIVE PENALTY

Sec. 486.031. IMPOSITION OF PENALTY. Authorizes the department to impose an administrative penalty on a person who violates Subchapter B. Authorizes the board to impose an administrative penalty on a person who violates Subchapter C.

Sec. 486.032. AMOUNT OF PENALTY. Sets forth the maximum amount of the penalty for each violation. Provides that each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. Sets forth the maximum amount of the penalty for a violation continuing or occurring on separate days. Sets forth the factors upon which the amount of the penalty is required to be based.

Sec. 486.033. REPORT AND NOTICE OF VIOLATION AND PENALTY. Requires the department or the board, if it initially determines that a violation occurred, to give written notice of the report by certified mail to the person. Sets forth the information the notice is required to include.

Sec. 486.034. PENALTY TO BE PAID OR HEARING REQUESTED. Authorizes the person, within a certain timeframe after receipt of the notice, to accept, in writing, the determination and the recommended penalty of the department or make a request for a hearing, in writing, on the occurrence of the violation, the amount of penalty, or both. Requires the commissioner of State Health Services (commissioner) or the executive director of the board (executive director), as applicable, by order, to approve the determination if either the person accepts the determination and recommended penalty or the person fails to respond to the notice.

Sec. 486.035. HEARING. Requires the commissioner or the executive director, as applicable, if the person requests a hearing, to refer the matter of the State Office of Administrative Hearings, which is required to promptly set a hearing date and give written notice of the time and place of the hearing to the person. Requires an administrative law judge of the State Office of Administrative Hearings to conduct the hearing. Requires the administrative law judge to make findings of fact and conclusions of law and to promptly issue to the commissioner or the executive director, as applicable, a proposal for a decision about the occurrence of the violation and the amount of the proposed penalty.

Sec. 486.036. DECISION. Authorizes the commissioner or the executive director, as applicable, based on findings of fact, conclusions of law, and proposal for a decision, by order to find either that a violation occurred and impose a penalty, or to find that a violation did not occur. Requires the notice of the commissioner's or the executive

director's order that is sent to the person to include a statement of the right of the person to judicial review of the order.

Sec. 486.037. **OPTIONS FOLLOWING DECISION: PAY OR APPEAL.** Requires the person, within a certain timeframe after the date the order that imposes an administrative penalty becomes final, to either pay the penalty or file a petition for judicial review of the order contesting the occurrence of the violation, the amount of the penalty, or both.

Sec. 486.038. **STAY OF ENFORCEMENT OF PENALTY.** (a) Authorizes a person who files a petition for judicial review within the period prescribed by Section 486.037 to stay enforcement of the penalty either by paying the penalty to the court for placement in an escrow account or by giving the court a supersedeas bond approved by the court that is for the amount of the penalty and is effective until all judicial review of the order is final. Alternatively, authorizes the person to request the court stay enforcement of the penalty by filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the penalty and is financially unable to give the supersedeas bond, and sending a copy of the affidavit to the commissioner or the executive director, as applicable, by certified mail.

(b) Authorizes the commissioner or the executive director, following the receipt of a copy of the affidavit, to file with the court, within a certain timeframe after the copy is received, a contest to the affidavit. Requires the court to hold a hearing on the facts alleged in the affidavit as soon as practicable and requires the court to stay the enforcement of the penalty on finding that the alleged facts are true. Provides that the person who files the affidavit has the burden of proving that the person is financially unable to pay the penalty or to give a supersedeas bond.

Sec. 486.039. **COLLECTION OF PENALTY.** Authorizes the penalty to be collected if the person does not pay and the enforcement of the penalty is not stayed. Authorizes the attorney general to sue to collect the penalty.

Sec. 486.040. **DECISION BY COURT.** Authorizes the court, if it sustains the finding that a violation occurred, to uphold or reduce the amount of the penalty and order the person to pay the full or reduced amount of the penalty. Requires the court to order that a penalty is not owed if the court does not sustain the finding that a violation occurred.

Sec. 486.041. **REMITTANCE OF PENALTY AND INTEREST.** (a) Requires the court, if the person paid the penalty and if the amount of the penalty is reduced or the penalty is not upheld by the court, to order, when the court's judgment becomes final, the appropriate amount plus accrued interest to be remitted to the person within a certain timeframe.

(b) Sets forth the rate at which interest accrues.

(c) Requires the interest to be paid for the period beginning on the date the penalty is paid and ending on the date the penalty is remitted.

Sec. 486.042. **RELEASE OF BOND.** Requires the court, if the person gave a supersedeas bond and the penalty is not upheld by the court, to order, when the court's judgment becomes final, the release of the bond. Requires the court, if the person gave a supersedeas bond and the amount of the penalty is reduced, to order the release of the bond after the person pays the reduced amount.

Sec. 486.043. **ADMINISTRATIVE PROCEDURE.** Provides that a proceeding to impose the penalty is considered to be a contested case under Chapter 2001 (Administrative Procedure), Government Code.

ARTICLE 3. TRANSITION LANGUAGE AND EFFECTIVE DATE

SECTION 3.01. Makes application of Sections 481.112 and 481.124, Health and Safety Code, as amended by this Act, and Sections 481.1122 and 504.003, Health and Safety Code, as added by this Act, prospective to September 1, 2005.

SECTION 3.02. Makes application of Articles 17.15 and 37.07, Code of Criminal Procedure, and Section 508.145, Government Code, as amended by this Act, prospective to September 1, 2005.

SECTION 3.03. Makes application of Section 99.003, Civil Practice and Remedies Code, as amended by this Act, and Section 468.004, Health and Safety Code, as added by this Act, prospective to September 1, 2005.

SECTION 3.04. Requires the Department of State Health Services to take all action necessary to establish the methamphetamine watch program, as required by Chapter 468, Health and Safety Code, as added by this Act, not later than September 1, 2005. Requires the criminal justice division of the governor's office to take all action necessary to begin implementation of the grant program required under Section 468.005, Health and Safety Code, as added by this Act, not later than September 1, 2005.

SECTION 3.05. Requires the director of the Department of Public Safety to adopt any rules necessary to administer and enforce Section 481.0771, Health and Safety Code, as added by this Act, not later than September 1, 2005.

SECTION 3.06. Requires the State Health Services Council to adopt rules to implement and enforce Subchapter B, Chapter 486, Health and Safety Code, as added by this Act, not later than September 1, 2005. Requires the Texas State Board of Pharmacy to adopt rules to implement and enforce Subchapter C, Chapter 486, Health and Safety Code, as added by this Act, not later than September 1, 2005.

SECTION 3.07. Effective date: upon passage or September 1, 2005.