

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 159 Sentencing for Controlled Substance Violations

SPONSOR(S): Criminal Justice Subcommittee; Edwards and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 420

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	8 Y, 5 N, As CS	Cox	Cunningham
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Section 893.135, F.S., relates to drug trafficking, which occurs when a person knowingly sells, purchases, manufactures, delivers, or brings into this state; or when a person is knowingly in actual or constructive possession of, a specified quantity of a drug. Generally, drug trafficking offenses are first degree felonies that are subject to mandatory minimum sentences, which vary depending on the type and quantity of drug trafficked. A judge has no discretion to sentence a person below the mandatory minimum sentence.

Paragraph (1)(c) of s. 893.135, F.S., establishes the offense of "trafficking in illegal drugs," and specifically addresses trafficking in morphine, opium, oxycodone, hydrocodone, and hydromorphone. If a person violates s. 893.135(1)(c)1., F.S., and the quantity involved is:

- 4 grams or more, but less than 14 grams - 3 year minimum mandatory and a \$50,000 fine.
- 14 grams or more, but less than 28 grams - 15 year minimum mandatory and a \$100,000 fine.
- 28 grams or more, but less than 30 kilograms - 25 year minimum mandatory and a \$500,000 fine.

There are numerous prescription medications that are within the scope of s. 893.135(1)(c), F.S., such as vicodin, percocet, etc. As such, a person who unlawfully possesses, purchases, sells, etc., these prescription medications in a trafficking weight may be subject to the mandatory minimum penalties outlined above.

The bill creates s. 893.135(8), F.S., authorizing the court to grant a state attorney or defendant's motion to depart from a mandatory minimum sentence required by s. 893.135(1)(c), F.S., if the court finds that a number of specified criteria are met. In deciding whether to depart from the mandatory minimum sentence, the court may consider a number of enumerated factors, including any fact the court considers relevant.

If the sentencing court grants the motion to depart from the mandatory minimum sentence for a defendant convicted of a violation of s. 893.135(1)(c)1.a., F.S., (4 grams or more but less than 14 grams), the bill requires the sentencing court to, as a part of any sentence it imposes, require the defendant to:

- Successfully complete postadjudicatory treatment-based drug court program; or
- If the defendant intends to reside in a county that has not established a postadjudicatory treatment-based drug court program, drug offender probation as described in s. 948.20(2), F.S.

On February 27, 2013, the Criminal Justice Impact Conference determined this bill will have a indeterminate negative prison bed impact (potential savings).

The bill has an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Drug Trafficking – Generally

Section 893.135, F.S., creates a variety of drug trafficking offenses. Drug trafficking occurs when a person knowingly sells, purchases, manufactures, delivers, or brings into this state; or when a person is knowingly in actual or constructive possession of, a specified quantity of a controlled substance.¹

Section 893.135, F.S., categorizes drug trafficking offenses by drug type as follows:

- Paragraph (1)(a) establishes the offense of “trafficking in cannabis;”
- Paragraph (1)(b) establishes the offense of “trafficking in cocaine;”
- Paragraph (1)(c) establishes the offense of “trafficking in illegal drugs;”
- Paragraph (1)(d) establishes the offense of “trafficking in phencyclidine;”
- Paragraph (1)(e) establishes the offense of “trafficking in methaqualone;”
- Paragraph (1)(f) establishes the offense of “trafficking in amphetamine;”
- Paragraph (1)(g) establishes the offense of “trafficking in flunitrazepam;”
- Paragraph (1)(h) establishes the offense of “trafficking in GHB;”
- Paragraph (1)(i) establishes the offense of “trafficking in GBL;”
- Paragraph (1)(j) establishes the offense of “trafficking in 1,4-butanediol;”
- Paragraph (1)(k) establishes the offense of “trafficking in phenethylamines;” and
- Paragraph (1)(l) establishes the offense of “trafficking in LSD.”

Generally, drug trafficking offenses are first degree felonies that are subject to mandatory minimum terms of imprisonment.² The mandatory minimum sentence applicable to a drug trafficking offense depends on the type and quantity of drug trafficked. A sentencing judge has no discretion to sentence a person below the mandatory minimum prison sentences outlined in statute, regardless of any mitigating testimony provided to the court.³ Only the state attorney has the discretion to waive the mandatory minimum sentence for trafficking offenses.⁴

Trafficking in Illegal Drugs

Paragraph (1)(c) of s. 893.135, F.S., establishes the offense of “trafficking in illegal drugs,” and specifically addresses trafficking in morphine, opium, oxycodone, hydrocodone, and hydromorphone. The statute provides:

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), (2)(a), (3)(c)3., or (3)(c)4., F.S., 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.”⁵

If a person violates s. 893.135(1)(c)1., F.S., and the quantity involved:

- Is 4 grams⁶ or more, but less than 14 grams, the person must be sentenced to a mandatory minimum term of imprisonment of 3 years and ordered to pay a fine of \$50,000.⁷

¹ See s. 893.135(1)(a)-(l), F.S.

² Section 893.135, F.S., provides for more severe penalties in certain situations. For example, drug trafficking is a capital felony if, during the commission of the offense, the defendant intentionally killed a person; counseled, commanded, induced, procured, or caused the intentional killing of an individual; or the trafficking led to a natural, though not inevitable, lethal result to another person.

³ 16 Fla. Prac., Sentencing s. 6:69 (2012-2013 ed.).

⁴ *Id.*

⁵ Section 893.135(10)(c)1., F.S.

⁶ For the purpose of comparison, the approximate weight of a U.S. currency note, regardless of denomination, is one gram.

www.moneyfactory.gov/faqlibrary.html (last visited on March 5, 2013).

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- Is 14 grams or more, but less than 28 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and ordered to pay a fine of \$100,000.⁸
- Is 28 grams or more, but less than 30 kilograms, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and pay a fine of \$500,000.⁹

There are numerous prescription medications that are within the scope of s. 893.135(1)(c), F.S., such as vicodin, percocet, etc. As such, person who unlawfully possesses, purchases, sells, etc., these prescription medications in a trafficking weight may be subject to prosecution for drug trafficking under s. 893.135(1)(c), F.S.

Weighing Prescription Medications for Drug Trafficking Offenses

When determining the weight of pills or tablets for trafficking offenses, the weight is determined by the total weight of each pill or tablet multiplied by the number of pills or tablets possessed, sold, etc. The total weight of a pill or tablet includes the weight of the controlled substance in the pill or tablet (e.g., hydrocodone) and the weight of noncontrolled substances or matter in the pill or tablet, such as coating, binders, and nonprescription drugs (e.g., acetaminophen).¹⁰

In a 2012 report, the Office of Program Policy Analysis and Government Accountability (OPPAGA) cited the example of a pill that had a weight of 0.65 grams with 10 milligrams (mg.) of hydrocodone: "... [I]t takes 7 pills of 10 mg. hydrocodone, which are large pills with 325 to 750 mg. of acetaminophen, to reach the threshold of 4 grams for a minimum mandatory prison sentence of three years."¹¹ Based upon this medication, OPPAGA found that 22 pills would meet the 14 gram threshold (15-year mandatory minimum term) and 44 pills would meet the 28 gram threshold (25-year mandatory minimum term).¹²

Due to the different compositions of prescription opioids, noncontrolled substances may add significantly to the total weight of the pill or tablet as, for example, is the case with medication that contains hydrocodone and acetaminophen. When comparing this medication to a sample medication containing oxycodone, which does not contain acetaminophen, OPPAGA found: "... [I]t takes approximately 31 pills of 30 mg. oxycodone to reach the threshold of 4 grams since this type of oxycodone is a smaller pill and does not include acetaminophen. Thus, it takes more oxycodone pills than hydrocodone pills to trigger a minimum mandatory sentence, even though oxycodone is more potent and likely to lead to adverse outcomes, such as addiction and overdose."¹³ Based upon this oxycodone medication, OPPAGA found that 108 pills would meet the 14 gram threshold (15-year mandatory minimum term) and 215 pills would meet the 28 gram threshold (25-year mandatory minimum term).¹⁴

OPPAGA Report: Sample Information Regarding Prescription Drug Trafficking Offenders

OPPAGA analyzed arrest reports for a sample of 194 offenders admitted to prison in Fiscal Year 2010-11 for opioid trafficking and determined that "almost all (93%) were convicted of trafficking in prescription painkillers... [A]rrests most commonly involved oxycodone (73%) or hydrocodone (28%). In comparison, 6% of the offenders were convicted of trafficking in heroin."¹⁵ OPPAGA provided the following information regarding how most of these arrests occurred:

⁷ Section 893.135(1)(c)1.a., F.S. This offense is ranked in Level 7 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(g), F.S.

⁸ Section 893.135(1)(c)1.b., F.S. This offense is ranked in Level 8 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(h), F.S.

⁹ Section 893.135(1)(c)1.c., F.S. This offense is ranked in Level 9 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(i), F.S.

¹⁰ See ss. 893.02(16) and 893.135(6), F.S.

¹¹ *Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking*, Office of Program Policy Analysis and Government Accountability, <http://www.oppaga.state.fl.us/Summary.aspx?reportNum=12-02> (last visited on March 5, 2013). Report No. 12-02 (January 2012), at p. 5. This report is further cited as "OPPAGA Report."

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ OPPAGA Report, at p. 3.

Most offenders in our sample (62%) were arrested for selling prescription painkillers to an undercover law enforcement officer or confidential informant... In these cases, officers worked undercover to buy drugs from known dealers or monitored confidential informants during meetings they arranged to make purchases. In other cases, offenders were arrested for trafficking after a traffic stop or other law enforcement contact, or after being reported by a pharmacist for possible prescription fraud.¹⁶

The majority of the offenders in OPPAGA's sample illegally possessed or sold 30 to 90 pills:

For most of the offenders convicted of trafficking in oxycodone or hydrocodone, their convictions were based on the illegal possession or sale of the number of pills equivalent to one or two prescriptions. For those offenders sentenced for trafficking in hydrocodone, 50% were arrested for possessing or selling fewer than 30 pills and 25% were arrested for fewer than 15 pills. For offenders sentenced for trafficking in oxycodone, offenders possessed or sold a median number of 91 pills at the time of their arrests.

Following accepted medical practice, physicians may prescribe 30 or more prescription painkillers for patients with chronic pain or recovering from surgery. For example, a patient recovering from surgery may receive a one-time prescription of 30 to 60 hydrocodone or oxycodone pills, often in forms that also contain acetaminophen. Illegal possession of such an amount could trigger a minimum mandatory sentence.¹⁷

Most of the offenders in the OPPAGA sample did not have a prior drug trafficking record and were determined by prison staff to need substance abuse treatment:

Our analysis of Department of Corrections data on the 1,200 offenders admitted to prison for opioid trafficking in Fiscal Year 2010-11 found that 74% had not previously been admitted to prison... Half had either never been on probation or had been on probation solely for drug possession, and 81% did not have a prior history of offenses involving selling or trafficking drugs. Most (84%) had no current or past violent offenses. These offenders tended to have substance abuse problems and were at low risk for recidivism. Prison staff assessments determined that 65% of these offenders needed substance abuse treatment and 61% were at low risk for recidivism.¹⁸

Minimum Mandatory Sentences

The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the "offense severity ranking chart"¹⁹ from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony.

A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record and other aggravating factors. The points are added in order to determine the "lowest permissible sentence" for the offense. A judge cannot impose a sentence below the lowest permissible sentence unless the judge makes written findings that there are mitigating "circumstances or factors that reasonably justify the downward

¹⁶ *Id.*

¹⁷ OPPAGA Report, at p. 4. In a footnote (n. 7, at p. 4) at the end of the second paragraph of this quote, OPPAGA noted: "Law enforcement and other stakeholders reported that pain clinics they would consider as being 'pill mills' routinely prescribe much higher amounts of prescription painkillers, such as 180 oxycodone pills per month."

¹⁸ *Id.* In a footnote (n. 8, at p. 4) at the end of the second paragraph of this quote, the OPPAGA noted: "Prison staff assessed offenders' risk of recidivism using the risk assessment instrument developed by the Department of Corrections (DOC). Recidivism is defined as return to prison within three years of release."

¹⁹ Section 921.0022, F.S.

departure.”²⁰ The permissible sentence (absent downward departure) for an offense ranges from the calculated lowest permissible sentence to the statutory maximum for the primary offense. The statutory maximum sentence for a first degree felony is 30 years, for a second degree felony is 15 years and for a third degree felony is 5 years.²¹

Rule 3.704(c)(26) of the Florida Rules of Criminal Procedure specifies that if the lowest permissible sentence is less than a mandatory minimum sentence, the mandatory minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, the lowest permissible sentence takes precedence.²²

With few exceptions, the sentencing court must impose the mandatory minimum term – there is no judicial discretion. There are only two circumstances in which a sentencing court is authorized by law to impose a sentence below the mandatory minimum term: when the court sentences a defendant as a youthful offender;²³ and when the state attorney waives the mandatory minimum sentence.²⁴

As noted above, the mandatory minimum sentence applicable to a drug trafficking offense depends on the type and quantity of drug trafficked. As shown in the following chart, a person need only possess 4 grams of an illegal substance (prescription drug) to reach the “trafficking in illegal drugs” threshold, while a person must possess a much greater amount of other drugs (cocaine, etc.) to reach the trafficking thresholds.

Trafficking Provision	First Weight Range	Second Weight Range	Third Weight Range
Trafficking in illegal drugs (includes prescription opioids) (s. 893.135(1)(c)1., F.S.)	3-year mandatory minimum term (4 grams to less than 14 grams)	15-year mandatory minimum term (14 grams to less than 28 grams)	25-year mandatory minimum term (28 grams to less than 30 kilograms)
Trafficking in cocaine (s. 893.135(1)(b)1., F.S.)	3-year mandatory minimum term (28 grams to less than 200 grams)	7-year mandatory minimum term (200 grams to less than 400 grams)	15-year mandatory minimum term (400 grams to less than 150 kilograms)
Trafficking in phencyclidine (s. 893.135(1)(d)1., F.S.)	3-year mandatory minimum term (28 grams to less than 200 grams)	7-year mandatory minimum term (200 grams to less than 400 grams)	15-year mandatory minimum term (400 grams or more)

Trafficking Provision	First Weight Range	Second Weight Range	Third Weight Range
Trafficking in methaqualone (s. 893.135(1)(e)1., F.S.)	3-year mandatory minimum term (200 grams to less than 5 kilograms)	7-year mandatory minimum term (5 kilograms to less than 25 kilograms)	15-year mandatory minimum term (25 kilograms or more)
Trafficking in amphetamine or methamphetamine (s. 893.135(1)(f)1., F.S.)	3-year mandatory minimum term (14 grams to less than 28 grams)	7-year mandatory minimum term (28 grams to less than 200 grams)	15-year mandatory minimum term (200 grams or more)

²⁰ Section 921.0026, F.S.

²¹ Section 775.082, F.S.

²² Rule 3.704(c)(26), Florida Rules of Criminal Procedure. A trafficking mandatory minimum term is a minimum sentencing “floor” for the court and there is no prohibition on earning gain-time. If the court only sentences the defendant to the mandatory term specified by statute, DOC establishes an 85% minimum service date on the term and the offender is subject to s. 944.275(4)(b)3., F.S., which does not allow release prior to serving a minimum of 85% of the sentence. If the court imposes a sentence that exceeds the mandatory term specified by statute, the DOC establishes an 85% minimum service date on the sentence. See *Mastay v. McDonough*, 928 So.2d 512 (Fla. 1st DCA 2006) (Section 893.135, F.S., does not preclude earning gain-time during the mandatory term as long as it does not result in the prisoner’s release prior to serving a minimum of 85% of the sentence).

²³ Section 958.04, F.S. See *Christian v. State*, 84 So.3d 437 (Fla. 5th DCA 2012).

²⁴ 16 Fla. Prac., Sentencing s. 6:69 (2012-2013 ed.). The state attorney may also move to reduce or suspend a sentence based upon substantial assistance rendered by the defendant. Section 893.135(4), F.S.

893.135(1)(f)1., F.S.)	grams)	grams)	
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Effect of the Bill

The bill creates subsection (8) in s. 893.135, F.S., to create a mechanism that allows a judge to depart from a mandatory minimum sentence required by s. 893.135(1)(c), F.S., for trafficking in illegal drugs (prescription drugs).

The bill authorizes the state attorney, defendant, or defense counsel to move the court to depart from the applicable mandatory minimum term of imprisonment in instances where a defendant has been convicted of a violation of s. 893.135(1)(c), F.S., that involves possession of a mixture that is a prescription drug as defined in s. 499.003, F.S. The court may grant such a motion if it finds:

- The defendant's violation of paragraph (1)(c), did not involve the use, attempted use, or threatened use of physical force against another person;
- The defendant's violation of paragraph (1)(c), did not result in the serious bodily injury, disfigurement or death of another person;
- In the commission of the offense in violation of paragraph (1)(c), the defendant was not armed with, did not threaten to use or display, and did not represent by word or conduct that they possessed a firearm, deadly weapon or dangerous instrument;
- The defendant has not been previously convicted of a felony or a misdemeanor involving violence;
- The provisions of the newly created subsection (8) have not been previously invoked;
- There was no evidence of possession with intent to distribute; and
- The quantity of prescription drugs involved in the violation evidenced that the drugs were for personal use.

In deciding whether to grant such motion, the court may consider any facts the court considers relevant, including, but not limited to:

- The criteria listed above;
- The sentencing report and any evidence admitted in a previous sentencing proceeding;
- The defendant's record of arrests;
- Any other evidence of allegations of unlawful conduct or the use of violence by the defendant;
- The defendant's family ties, length of residence in the community, employment history, and mental condition;
- The likelihood that an alternative sentence will produce the same deterrent effect, rehabilitate the defendant, and prevent or delay recidivism to an equal or greater extent than imposition of the mandatory minimum term of imprisonment; and
- Whether the defendant has a history of alcohol or substance abuse.

If a sentencing court grants the motion to depart from the mandatory minimum sentence for a defendant convicted of a violation of s. 893.135(1)(c)1.a., F.S., (4 grams or more but less than 14 grams), the sentencing court must, as a part of any sentence it imposes, require the defendant to successfully complete postadjudicatory treatment-based drug court program. If the defendant intends to reside in a county which has not established a postadjudicatory treatment-based drug court program, the sentencing court must, as a part of any sentence it imposes, sentence the defendant to drug offender probation, as described in s. 948.20(2), F.S.

If the court grants the motion, the court must state in open court at the time of sentencing the specific reasons for imposing the sentence and not imposing the mandatory minimum sentence.

B. SECTION DIRECTORY:

Section 1. Amends s. 893.135, F.S., relating to trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.

Section 2. Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

On February 27, 2013, the Criminal Justice Impact Conference determined that this bill will have an indeterminate negative prison bed impact (potential savings).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. For a court to depart from the minimum mandatory sentence, a finding must be made that the defendant has not previously invoked the provisions of this subsection. There could be practical difficulties with obtaining this information as a defendant's criminal history could involve more than one county, thus making those court records more difficult to obtain.

2. A court must make a finding that the defendant has not previously been convicted of a felony. There is no guidance in the bill as to whether this is intended to preclude only those defendants who have been previously adjudicated for a felony offense, or whether it also precludes defendants who have a withhold of adjudication for a felony offense in their criminal history.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2013, the Criminal Justice Subcommittee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- Add additional criteria which must be met for a sentencing court to grant a motion to depart filed under subsection (8);
- Modify the factors which may be considered by a sentencing court when granting a motion to depart filed under subsection (8); and
- Provide that if a sentencing court does grant the motion to depart from the mandatory minimum sentence for a defendant convicted of a violation of s. 893.135(1)(c)1.a., F.S., (4 grams or more but less than 14 grams), the sentencing court must, as a part of any sentence it imposes, require the defendant to successfully complete postadjudicatory treatment-based drug court program; or if a postadjudicatory treatment-based drug court program is not available in the defendant's county of residence, drug offender probation as described in s. 948.20(2), F.S.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.